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No. 86-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BOSTON AND MAINE CORPORATION, *et al.*,
Petitioners,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

CHARLES S. EINSIEDLER, JR.
PIERCE, ATWOOD, SCRIBNER,
ALLEN, SMITH & LANCASTER
One Monument Square
Portland, Maine 04101
(207) 773-6411

RALPH J. MOORE, JR.*
WILLIAM F. SHEEHAN
RICHARD M. WYNER
D. EUGENIA LANGAN
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000
Counsel for Petitioners

* Counsel of Record

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QUESTION PRESENTED

Whether § 2 Fourth of the Railway Labor Act provides a judicial remedy for claims that a railroad has retaliated against an employee for strike-related or other union activity, where there is no claim that the railroad seeks to undermine the union's representative status and the employee has a remedy in arbitration before an adjustment board under § 3 of the Act.*

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* The parties to the proceeding in the court of appeals were the same as those here, *i.e.*, petitioners Boston and Maine Corporation, Maine Central Railroad Company, Portland Terminal Company, and Delaware & Hudson Railway Company and respondent Railway Labor Executives' Association. Petitioners are wholly owned subsidiaries of Guilford Transportation Industries, Inc., which has no parent company. Petitioners' affiliates are Albany and Vermont Railroad Company, Albany Post Railroad Corporation, Northern Railroad, Saratoga and Schenectady Railroad Company, Stony Brook Railroad Corporation, and Vermont and Massachusetts Railroad Company.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

OPINIONS BELOW

The opinion of the court of appeals (App. 1a) is reported at 808 F.2d 150 (1st Cir. 1986). Its order denying rehearing (App. 65a) is not reported. The opinion of the district court (App. 19a) is reported at 639 F. Supp. 1092 (D. Me. 1986).

JURISDICTION

The final judgment of the court of appeals denying rehearing (App. 65a) was entered on March 13, 1987. On June 2, 1987, Justice Brennan granted petitioners' application for an extension of time in which to file a petition for a writ of certiorari to and including June 25, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The relevant portions of Sections 2, 3, and 10 of the Railway Labor Act, 45 U.S.C. §§ 151a, 152, 153, and 160, are reproduced at App. 67a-77a.

STATEMENT

1. *The strike and job abolishments.* This case arises out of a 1986 strike by the Brotherhood of Maintenance of Way Employes ("BMWE") against the Maine Central Railroad Company and its then-subsidiary, the Portland Terminal Company (collectively "MEC"). The BMWE is a labor organization that represents the MEC's maintenance of way employees, as well as maintenance of way employees of the MEC's sister companies, the Boston and Maine Corporation ("B&M") and the Delaware & Hudson Railway Company ("D&H").[1] Respondent Railway Labor Executives' Association ("RLEA") consists of the presidents of the BMWE and various other unions that represent other employees of those carriers.

On April 2, 1984, the BMWE served on the MEC a proposal to change certain aspects of the MEC-BMWE collective bargaining agreement. In particular, the BMWE proposed that the MEC give up its existing right to abolish maintenance of way positions. The parties engaged in the lengthy negotiation and mediation procedures provided for by §§ 5 and 6 of the Railway Labor Act, 45 U.S.C. §§ 155 and 156, but ultimately failed to reach agreement. (App. 3a-4a.)[2]

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[1] MEC, B&M, and D&H are wholly-owned subsidiaries of Guilford Transportation Industries, Inc.

[2] The Act's sequential procedures for handling collective bargaining disputes are described in *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 379 (1969), and *Detroit & Toledo Shore Line R.R.* v. *United Transp. Union*, 396 U.S. 142, 152 (1969).

On February 28, 1986, the MEC abolished some 15 to 20 maintenance of way positions. On March 3, the BMWE went on strike. Subsequently the BMWE commenced secondary picketing of the B&M and the D&H. Fewer than 2% of the three carriers' union-represented employees crossed BMWE's picket lines. (App. 4a.) The work stoppage caused an immediate and drastic decline in the carriers' business and revenues. (App. 40a; see charts at App. 53a-55a.)

On April 14, when the strike was in its seventh week, the carriers learned that the National Mediation Board had recommended to the President that he appoint an Emergency Board under § 10 of the Act to study and report on the MEC-BMWE dispute. (App. 5a.) Appointment of a Board would end the strike, at least for the 60-day period prescribed in § 10. See 45 U.S.C. § 160. The carriers realized that the decline in their business would continue even after the end of the strike. Thus, if an Emergency Board were appointed and the strike ceased, their entire pre-strike workforce might return to their positions even though, given the business decline, there would not be enough work for that many employees. The carriers' collective bargaining agreements generally require a notice period of five days before a job may be abolished. Hence if all the carriers' employees returned to work, the carriers would be required to pay those employees for whom there was no work, and whose jobs would accordingly be abolished, some five days' pay. Accordingly, on April 18, in order to protect against that contingency, the carriers issued permanent job abolishment notices pursuant to their collective bargaining agreements, covering virtually all of the positions on the railroads, so that, if the strike were to end, they could assess their needs and determine how many jobs to reestablish in light of the level of business existing at that time. (App. 5a and 26a.)

On May 16, approximately one month later, the BMWE expanded its secondary picketing to Conrail, and shortly

thereafter the President did in fact establish an Emergency Board to investigate the MEC-BMWE dispute. The President's order, echoing § 10 of the Act, provided that during the 60-day Emergency Board period "no change * * * shall be made by the parties to the controversy in the conditions out of which the dispute arose." (App. 6a.)

Even though the MEC had abolished all positions during the strike in accordance with its existing rights under its collective bargaining agreements, it nevertheless decided to restore all of its employees to the positions that they had held before the strike. (App. 6a and 29a.) Shortly thereafter, however, again exercising its contractual right to abolish positions, the MEC issued new job abolishments, effective after the prescribed notice period, covering some 267 of 734 existing positions, a reduction in force corresponding to the MEC's reduced business levels. (App. 6a-7a and 29a; Dfts' Exhs. 29-F and 29-G.) The B&M and the D&H, on the other hand, believing that they were not covered by the President's order since they were not parties to the MEC-BMWE dispute, simply reestablished some 50% of their pre-strike positions, similarly corresponding to the volume of business remaining after the strike. The returning workers bid for those jobs on the basis of pre-strike seniority. (App. 7a and 29a.)

Thus, to bring employment levels in line with business levels, the MEC, covered by the Order, called back all employees and then abolished jobs; whereas the B&M and D&H, not covered, called back only a percentage of their pre-strike workforce.

2. *The district court ruling.* RLEA challenged both the mid-strike and post-strike job abolishments as well as other actions by the carriers in applying various work rules following the strike. RLEA contended that these job abolishments and other actions were done to punish employees who struck or honored picket lines. The car-

riers argued in response that all of their actions, including the job abolishments, were authorized by and proper under the parties' collective bargaining agreements, and that the unions' objections to those actions, including any claim that the carriers had sought to punish employees, raised only "minor disputes" over the application of the parties' labor agreements, which are subject to mandatory arbitration by adjustment boards under § 3 of the Act.[3]

After a trial, the district court entered permanent injunctions against each of the carriers. The court recognized that the MEC needed to reduce its workforce after restoring everyone to work upon issuance of the President's Order, and it ruled that the MEC would have been justified in implementing an "appropriately conceived and executed" workforce reduction based on economics. (App. 40a.) The court concluded, however, that the MEC had instead singled out for abolishment only the jobs of workers who had honored the BMWE's picket lines. (App. 43a.)[4]

As to the B&M and D&H, the district court agreed that they were not subject to the President's Order and thus had no obligation to restore the pre-strike status quo

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[3] Section 3 First (i) of the Act, 45 U.S.C. 153 First (i), provides that

> "The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or *application of agreements* concerning rates of pay, rules, or working conditions * * * shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board * * *" (emphasis added).

[4] It reached that conclusion even though essentially all (over 98%) of MEC's employees honored the picket lines and hence there was virtually no one to discriminate in favor of. (App. 4a.)

by recalling all of their employees to their pre-strike positions. (App. 46a.) But the court nevertheless held that those carriers had violated their collective bargaining agreements by the mid-strike job abolishments. The court evidently construed the labor contracts to impose a duty on the carriers to let all their employees return to work at the strike's end, and ruled that the mid-strike abolishments constituted an "anticipatory breach" of that duty. (App. 47a-48a.) The court ordered all of the carriers to recall all of their employees and to pay them back pay. (App. 51a-52a.)[5]

3. *The court of appeals ruling.* The First Circuit affirmed as to the MEC but reversed as to the B&M and D&H. It agreed that the MEC had the right under its labor agreements to abolish jobs after taking all of its workers back. (App. 11a.) But then, focusing on the claim that the abolishments had been undertaken with an eye to punish strikers, it said that "[t]he real question * * * is whether a claim that the carrier has discriminated against its employees because they have engaged in activities protected by the RLA falls within the [exclusive] jurisdiction of the adjustment boards, or whether such an allegation may be brought in the courts." (App. 12a.) The court held that abolishing the jobs of employees who had engaged in "protected activity" was "contrary to the rights of employees as established in Section 2, Fourth, of the RLA,"[6] and that therefore the district

[5] The following week, after the carriers had reinstated all of their employees, the district court approved a new plan of job abolishments under which the carriers abolished almost all of the positions that were ordered reinstated. (App. 61a-63a.)

[6] Section 2 Fourth, 45 U.S.C. § 152 Fourth, provides in relevant part that:

> "Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers,

court had jurisdiction over RLEA's claims. (App. 14a-15a.) On the merits, the court ruled that substantial evidence supported the district court's finding that the MEC had selectively abolished the jobs of employees that honored picket lines. (App. 14a.) Hence it affirmed as to the MEC.

The court of appeals then held that RLEA's challenge to the B&M's and the D&H's so-called "anticipatory breach" of their labor agreements, like any other claimed breach of such agreements, fell within the exclusive jurisdiction of an adjustment board. (App. 17a.) Accordingly, it reversed the judgment against those two carriers. On petition for rehearing, however, it held that the district court, on remand, could determine whether the B&M and D&H, like the MEC, had acted to punish workers rather than for financial or other lawful motives. (App. 66a.)

REASONS FOR GRANTING THE WRIT

The decision below creates a square conflict with decisions of four other Circuits regarding the justiciability of a claim that a rail carrier has acted to punish or otherwise discriminate against employees for union-related activities. The rule in the four other Circuits is that, once a union has established itself as the collective

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or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions * * *."

bargaining representative and is able to process claims through arbitration, § 2 Fourth provides a judicial remedy only for claims that a carrier is seeking to undermine the union's representative status, which is what § 2 Fourth by its terms protects. Otherwise claims of retaliatory discharge, and other such claims, fall within the exclusive jurisdiction of an adjustment board under § 3 to resolve disputes over the "application" of collective bargaining agreements.

Those decisions struck the appropriate balance between the role of the courts under § 2 Fourth and the adjustment boards under § 3. They allow courts to deal effectively with employer campaigns to undercut representational rights, protected by § 2 Fourth, while at the same time limiting courts to the minimal role in railway labor disputes intended by Congress by sending disputes arising from the interpretation or application of agreements made by employees' representatives to the adjustment boards, whose jurisdiction is exclusive.

Under the decision below, however, the adjustment board's exclusive jurisdiction can be avoided, and the courts drawn into the fray, by the expedient of pleading that a disputed application of an agreement is "discriminatory" or "retaliatory," thus dressing up a "minor dispute" as a § 2 Fourth violation. That result is fundamentally at odds with the plain language, history, and purposes of the Railway Labor Act and encourages an end run around Congress' determination that it is "essential" that minor disputes go to adjustment boards rather than to the federal courts.

1. The Decision Below Conflicts With Decisions Of Four Other Circuits

Section 2 Fourth of the Railway Labor Act gives employees "the right to organize and bargain collectively *through representatives of their own choosing*" and makes it unlawful for any employer to (1) "deny or in any way question the right of its employees to join,

organize, or assist in organizing the labor organization of their choice," (2) "to interfere in any way with the organization of its employees," or (3) to "coerce employees in an effort to induce them * * * not to join or remain members of any labor organization." (Emphasis added.) Section 3 First, on the other hand, grants to the adjustment boards mandatory and exclusive jurisdiction over "disputes * * * growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions."

Many decisions have addressed the question whether the courts under § 2 Fourth, or adjustment boards under § 3, have jurisdiction over a claim that an employer's exercise of rights under the applicable collective bargaining agreement was invalid because it was motivated by a desire to punish the employee for union-related activity rather than by financial or other legitimate concerns. Prior to the decision below, the answer was that such claims are to be decided by the adjustment boards unless the carrier's actions are intended to destroy the union's representative status.

The Fifth Circuit was the first to so hold. In *Brotherhood of Railroad Trainmen* v. *Central of Georgia Ry.*, 305 F.2d 605 (5th Cir. 1962), an individual employee and his union claimed that the employee had been singled out for discipline because he was a union official. The court ruled that the individual, personal claims were subject to mandatory arbitration before an adjustment board. But it upheld federal jurisdiction over the union's claim under § 2 Fourth of the Act, emphasizing that the union had made a "direct, positive charge" that the carrier's purpose was to "thwart [the official's] (and the Brotherhood's) effectiveness as a collective bargaining agent" and that a railroad "is not free to destroy the process of collective bargaining and resolution of industrial grievances by wrongfully destroying the effectiveness of the chosen representative." (*Id.* at 608.) Almost

immediately thereafter the Fifth Circuit reaffirmed that the second half of its *Central of Georgia* ruling applied only in cases involving an "independent underlying purpose on the part of the employer to thwart the effectiveness of collective bargaining agents." *International Ass'n of Machinists* v. *Eastern Airlines, Inc.*, 320 F.2d 451, 454 (5th Cir. 1963).[7]

The Fifth Circuit was followed by the Third in *International Ass'n of Machinists & Aerospace Workers* v. *Northwest Airlines, Inc.*, 673 F.2d 700 (3d Cir. 1982). The union there claimed that five employees had been disciplined as a means of undermining the union. The carrier responded that the discipline was based on the employee's wrongful conduct. The court of appeals stated that the purpose of § 2 Fourth was to insure "that employees' designation of bargaining representatives would be free from employer coercion or interference" and that other courts had therefore held that § 2 Fourth provides only "limited rights outside the context of representational disputes * * *." (*Id.* at 707.) The court agreed with those limitations, holding that "[w]here a collective bargaining agreement is in place, as it was here, Section 2 is limited in application to circumstances such as those presented in [*Central of Georgia*]." (*Id.* at 707 n.6.) Accordingly, to take a claim from the adjustment board and establish federal court jurisdiction—

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[7] In that case, the union alleged that the carrier's actions were part of a deliberate scheme to eliminate the union as the sole bargaining agent; yet the court held that even that allegation was insufficient to remove the dispute from the exclusive jurisdiction of the Adjustment Board. It ruled: "The Adjustment Board cannot be by-passed; its jurisdiction cannot be thwarted in minor disputes in grievance cases by the bald allegation that the violations of the agreement are 'but a part of a deliberate scheme' designed to eliminate the union as sole bargaining agent. A contrary holding would go far toward eliminating the usefulness of the Adjustment Board." *Id.* at 454.

> "the plaintiff proposing a Section 2 theory such as the one proposed here must allege that the defendant is engaged in a general campaign or effort designed to destroy or undermine the union's representation of its members." (*Id.* at 711.)

The Second Circuit adopted the same view in *Independent Union of Flight Attendants* v. *Pan American World Airways, Inc.*, 789 F.2d 139 (2d Cir. 1986). The union contended that a flight attendant who was also a union representative had been suspended in retaliation for statements she made to the FAA; Pan Am defended on the ground that she had made false or misleading statements justifying the discipline. The court held that the case presented only a minor dispute, and that the district court had no jurisdiction under § 2. The court noted "Congress' exacting allocation of administrative jurisdiction" under § 3 of the Act, and ruled that Congress had provided only a " 'thread' of judicial intervention in cases in which, 'but for the general jurisdiction of the federal courts there would be no remedy to enforce the statutory commands which Congress had written into the Railway Labor Act.' " (*Id.* at 141.) Hence "[w]here, as here, a post-certification dispute develops concerning existing rights, that dispute would appear to arise under section 153." (*Id.*) The Second Circuit also ruled, applying the Fifth and Third Circuit decisions just discussed, that the union had not demonstrated that the carrier's disciplinary action reflected a "predetermined effort to 'frustrate and undermine the effectiveness of [the] bargaining agent * * *.' " (*Id.* at 142.) In short, there is no jurisdiction under § 2 absent "a clear showing of an overall employer objective of undermining union representation," lest a court "infringe upon Congress' conferral of jurisdiction on the adjustment boards." (*Id.* at 142 n.3.)

The Second Circuit also rejected the union's reliance on § 7 of the National Labor Relations Act, which ex-

pressly gives employees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." The court noted that no such provision appears in the Railway Labor Act and concluded that the legislative history of that Act supports a more restrictive construction of § 2 Fourth, which by its terms deals only with representational rights. (*Id.* at 141 n.2.)

The Ninth Circuit adopted the same limited construction of § 2 Fourth in *International Association of Machinists and Aerospace Workers* v. *Alaska Airlines, Inc.*, 813 F.2d 1038 (9th Cir. 1987). The case involved various aspects of the airline's plan for bringing back workers after a strike. The union claimed that the carrier had violated § 2 Fourth by hiring permanent replacements, granting superseniority to employees who worked during the strike, and withholding information. The airline claimed that its actions were proper under the parties' agreement because the unions had violated a no-strike clause. Observing that courts have asserted jurisdiction under § 2 Fourth only where "judicial involvement was the only means of enforcing the RLA," and applying the test developed in *Central of Georgia* and *Northwest Airlines*, the court ruled that

> "IAMA does not contend that Alaska was attempting to interfere with the workers' *choice of a bargaining representative*; the union alleges only that the recall plan weakens their union by replacing members, and so violated the RLA. This roundabout effort to reach a statutory violation is not a sufficient ground for a court to assume jurisdiction." (*Id.* at 1040-41, emphasis added.)

In short, the Second, Third, Fifth and Ninth Circuits have all ruled that once a union is certified and claims can be taken to an adjustment board, § 2 Fourth provides substantive rights, and permits judicial intervention, only if an employer interferes with the employees' choice of

representatives through a deliberate campaign to undermine or destroy the union's representation of its members. Otherwise employee grievances based on alleged anti-union animus must be taken to the adjustment boards.

The decision below squarely conflicts with those rulings. The First Circuit accepted the district court's finding that the MEC abolished the jobs of those employees who had observed the picket lines and then held that "[t]here is no question but that such action is contrary to the rights of employees as established in Section 2, Fourth, of the RLA." (App. 14a.) Had the court below applied the construction of § 2 Fourth adopted by the four other Circuits, however, respondents would have been obliged to take their claims to the adjustment boards. Respondents never alleged, in their complaint or elsewhere, that petitioners had interfered with the employees' choice of representatives through a deliberate campaign to destroy or undermine the unions' representation of their members, or otherwise. Nor did the district court make any such finding. Indeed, such a claim could not be sustained, because the carriers continued to recognize the unions as usual and agreed to expedited arbitration of the unions' grievances. (6/23/86 Tr. 156-57.)[8] Accordingly, it is only by departing from the settled rule in four other Circuits that the court below was able to affirm the judgment against the MEC, and to keep alive on remand the unions' claims against the B&M and the D&H.[9]

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[8] Identical facts were relied on by the Third Circuit in its decision for the carrier: "It is undisputed that Northwest has continually recognized the IAM as the authorized bargaining representative for the class of employees in question and, prior to the institution of this action, Northwest agreed to submit the underlying disputes to the IAM-Northwest Board of Adjustment." *Northwest Airlines, supra*, 673 F.2d at 712 n.12.

[9] As noted above, the court of appeals, on rehearing, stated that the district court remained free to determine on remand whether

2. The Decision Below Misconstrues §§ 2 Fourth and 3 First And Runs Counter To The Act's Fundamental Preference For Arbitration Over Federal Court Litigation

The court of appeals' decision is plainly incorrect in ways that will have important effects on the allocation of responsibilities between courts and railway and airline adjustment boards under the Railway Labor Act. The decision below is opposed to the plain language of §§ 2 Fourth and 3 First (i) of the Act. It ignores the legislative history of § 2 Fourth. It sends cases to the courts for which adjustment boards provide a fully adequate remedy. It is irreconcilable with this Court's repeated holdings that the jurisdiction of adjustment boards is exclusive. And it conflicts with the strong federal policies favoring arbitration of labor disputes in general and railway labor disputes in particular.

A. In adopting a much broader reading of the rights secured by § 2 Fourth, and a concomitantly narrower reading of the adjustment board's jurisdiction under § 3, than four other courts of appeals, the First Circuit has disregarded the plain language of the Act. Section 3 First (i) assigns exclusively to the adjustment board all disputes over the "application of agreements concerning rates of pay, rules, or working conditions." *See* note 3 *supra*. The present case unmistakably involves a dispute over whether the carriers applied the agreements in a proper or a retaliatory and capricious manner. On the other hand, § 2 Fourth by its plain terms speaks only of employees' rights to choose their own representatives and

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the B&M or D&H had violated § 2 Fourth by acting with discriminatory intent. (App. 66a.)

The conflict among the Circuits is not ameliorated by the First Circuit's citation to the *Northwest* decision as "suggesting in detail the analysis that a district court should undertake," since that necessarily referred only to the Third Circuit's analysis of the shifting burdens of proof (673 F.2d at 711-12), not to the scope of rights protected by § 2 Fourth.

remain in the union of their choosing. *See* note 6 *supra.* Indeed, unlike § 7 of the National Labor Relations Act, § 2 Fourth does not confer a right "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *," and thus cannot be read to cover more than representational rights. See 29 U.S.C. § 157.[10] In short, the Act's plain terms support the conclusions reached by the other four Circuits.

B. The First Circuit also ignored the legislative history of § 2 Fourth. As the Second Circuit held in *Pan American*, that history demonstrates that a more limited construction of § 2 Fourth was intended than that adopted by the court below. See 789 F.2d at 141 n.2. Section 2 Fourth was added to the Act in 1934 in order to "ma[k]e more explicit" the Act's guarantee that "employees were free to organize and to make choice of their representatives without the 'coercive interference' and 'pressure' of a company union organized and maintained by the employer" and to "protect[] the freedom of choice of representatives, which was an essential of the statutory scheme * * *." *Virginian Ry.* v. *System Fed'n No. 40*, 300 U.S. 515, 543 (1937). See also, *e.g.*, S. Rep. No. 1127, 73d Cong., 2d Sess. 2 (1934); H.R. Rep. No. 1944, 73d Cong., 2d Sess. 2 (1934). In short, the purpose of § 2 Fourth was simply to reinforce the "[f]reedom of choice in the selection of representatives on each side of the dispute," which was "the essential foundation of the statutory scheme." *Texas & N.O. R.R.* v. *Brotherhood of Railway & Steamship Clerks*, 281 U.S. 548, 569 (1930).

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[10] This Court has recognized that § 2 Fourth is narrower in scope than § 7, attributing this intentional distinction to "the difference between the 'embroyo organizations in the industries covered by' the NLRA, and the already 'strongly organized' railway unions." *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 385 n.20 (1969).

C. It is clear that adjustment boards under § 3 of the Act can and will provide a fully adequate remedy for claims of the kind asserted here. Those boards have ruled repeatedly that collective bargaining agreements impose an implied prohibition against arbitrary, capricious, or discriminatory action, and hence have entertained claims that carrier action was improperly motivated by discrimination.[11] And, in particular, adjustment boards have entertained claims that carriers had applied their force reduction rules after a strike vindictively to refuse to return strikers to work.[12] Indeed, *in this very case*, the unions themselves filed grievances initiating the § 3 arbitration machinery that leads to the adjustment boards, expressly charging discriminatory motive:

> "The Carrier has discriminated against this Claimant when applying this rule as punishment to those who honored the striking workers' picket lines. Such discrimination in applying this rule is without just cause since the employees within the MW Track and

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[11] See, *e.g.*, *United Transp. Union* v. *Atchison, T. & S.F. Ry.*, Award No. 23, at 2 (Pub. L. Bd. No. 2158 1979); *Brotherhood of Maintenance of Way Employes* v. *Elgin, J. & E. Ry.*, Award No. 17312, at 7 (NRAB, 3d Div. 1969); *Brotherhood of Railroad Signalmen* v. *Erie-Lackawanna R.R.*, Award No. 13933, at 19 (NRAB, 3d Div. 1965) ("What plainly is needed to establish the present claim is additional evidence, specifically, proof that supports Petitioner's assertions that the changes in question were made either 'to hurt' Claimant because of his union activities, or, in breach of" the agreement); *Brotherhood of Railway and Steamship Clerks* v. *Pennsylvania R.R.*, Award No. 12419, at 15 (NRAB, 3d Div. 1964) ("There is no evidence here that the Carrier's refusal to permit Claimant to bump on the job sought was motivated by prejudice or discrimination.").

[12] See, *e.g.*, *Brotherhood Railway Carmen* v. *Chicago & N.W. Transp. Co.*, Award No. 10732 (NRAB, 2d Div. 1986); *Brotherhood Railway Carmen* v. *Missouri-Kansas-Texas R.R.*, Award No. 10871 (NRAB, 2d Div. 1986) (awarding pay to any employee who had been held out of work for an excessive period of time following the end of a strike).

B&B Departments were not treated equally." (Plaintiff's Exhibits 29A and 29B.)[13]

Thus the decision creates a judicial remedy where there is no need for one, since the adjustment boards are open to such claims.[14]

D. The First Circuit's holding is irreconcilable with, and the holdings of the other courts of appeals are strongly supported by, the "strong federal policy favoring arbitration of labor disputes" (*Gateway Coal Co.* v. *United Mine Workers*, 414 U.S. 368, 382 (1974)), a policy that has particular force under the Railway Labor Act. This Court has on numerous occasions held that the adjustment board's jurisdiction over minor disputes is "exclusive" (*Andrews* v. *Louisville & N. R.R.*, 406 U.S. 320, 325 (1972); *Brotherhood of Locomotive Engineers* v. *Louisville & N. R.R.*, 373 U.S. 33, 38 (1963)) and that, in fact, "Congress considered it essential to keep these so-called 'minor' disputes within the Adjustment Board and out of the courts" (*Union Pacific R.R.* v. *Sheehan*, 439

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[13] Notwithstanding the unions' own earlier submission of their claims to the § 3 arbitral process, the court of appeals asserted that "these are claims that cannot be resolved by interpretation of the collective bargaining agreement." (App. 12a.) As just noted, however, the adjustment boards are perfectly able to resolve them as involving the disputed "application" of the agreements.

[14] In support of its ruling, the court below mistakenly relied on cases where no adjustment board remedy was available. (App. 12a-13a.) This critical distinction was expressly recognized by the Third and Ninth Circuits. See *Northwest Airlines, supra*, 673 F.2d at 707 ("In these pre-certification cases, the employees could not grieve their discharges, because no bargaining representative had been designated or certified. As a result no collective bargaining agreement was in existence and no employees' dispute could be submitted to a Board of Adjustment because a Board had not been created."); *Alaska Airlines, supra*, 813 F.2d at 1040 ("In each cited case, judicial involvement was the only means of enforcing the RLA.").

U.S. 89, 94 (1978)).[15] That conclusion follows directly from the Act's fundamental purposes. The Railway Labor Act's system of "internal government" (*Pennsylvania R.R.* v. *Day*, 360 U.S. 548, 552 (1959)) was designed "to secure the prompt, orderly and final settlement of grievances" (*Sheehan*, 439 U.S. at 94; *Transportation-Communication Employees Union* v. *Union Pacific R.R.*, 385 U.S. 157, 162 (1966); see 45 U.S.C. § 151a); to place such grievances in the hands of expert arbitrators versed in the railroad industry's customs and practices (*Gunther* v. *San Diego & A.E. Ry.*, 382 U.S. 257, 261 (1965); *Order of Railway Conductors* v. *Pitney*, 326 U.S. 561, 566-67 (1946));[16] and ultimately to minimize conflicts between labor and management leading to service interruptions in the railroad industry (*Slocum* v. *Delaware, L. & W. R.R.*, 339 U.S. 239, 242 (1950); *Union Pacific R.R.* v. *Price*, 360 U.S. 601, 609 (1959)).

E. In short, the decision below is flatly inconsistent with the terms and intent of the Act, creates a conflict

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[15] See also, *e.g.*, *Order of Railway Conductors* v. *Pitney*, 326 U.S. 561, 566 (1946) (Congress "intended to leave a minimum [of] responsibility to the courts"); *General Comm. of Adjustment* v. *Missouri-Kansas-Texas R.R.*, 320 U.S. 323, 333 (1943) ("The inference is strong that Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate.").

[16] The case at bar confirms that the adjustment boards' well-recognized expertise is essential to the proper resolution of "improper motive" claims. Adjustment boards are "peculiarly familiar with the thorny problems and the whole range of grievances that constantly exist in the railroad world." *Gunther*, 382 U.S. at 261. The district court here invalidated the MEC's post-strike job abolishments because, in its view, the MEC had failed to properly consider "economies of scale" and had abolished more jobs than necessary in light of its admittedly precipitous decline in business. (App. 44a-45a.) It is just such a problem—involving the relationship in the railroad industry between declines in business and declines in workforce—that an adjustment board rather than a district court may be expected to have special expertise in handling.

among the Circuits over the meaning of §§ 2 Fourth and 3 First, encourages forum shopping in railway labor disputes, and invites claimants to go to court with disputes that Congress, for powerful reasons, assigned to the exclusive jurisdiction of adjustment boards. The federal courts have duties enough without taking on large numbers of grievances that in the past have been handled perfectly well by adjustment boards, as Congress intended.[17]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES S. EINSIEDLER, JR.
PIERCE, ATWOOD, SCRIBNER, ALLEN, SMITH & LANCASTER
One Monument Square
Portland, Maine 04101
(207) 773-6411

RALPH J. MOORE, JR.*
WILLIAM F. SHEEHAN
RICHARD M. WYNER
D. EUGENIA LANGAN
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000
Counsel for Petitioners

* Counsel of Record

June 25, 1987

[17] In 1985, the latest year for which figures are available, the adjustment boards handled over 8500 cases, and over 21,000 others remained pending. See *Budget of the United States: Fiscal Year 1987*, Appendix at I-Z80. The ruling below will allow unions, by artful pleading, to bring large numbers of these and future cases into the federal courts.

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 86-1653

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Appellee,

v.

BOSTON & MAINE CORPORATION, *et al.*,
Appellants.

Appeal from the United States District Court
for the District of Maine

[Hon. Gene Carter, *U.S. District Judge*]

Before
Campbell, *Chief Judge*,
Bownes and Torruella, *Circuit Judges.*

Ralph J. Moore, Jr., with whom *William F. Sheehan, Richard M. Wyner, D. Eugenia Langan, Shea & Gardner, Charles S. Einsiedler, Jr., Pierce, Atwood, Scribner, Allen, Smith & Lancaster* and *John Townsend Rich* were on brief for appellants.

John O'B. Clarke, Jr. with whom *Thomas P. Murphy, Kimberly A. Madigan, Highsaw & Mahoney, P.C., Craig J. Rancourt* and *Law Offices of Craig J. Rancourt* were on the brief for appellee.

December 22, 1986

TORRUELLA, *Circuit Judge.* The central issue presented by this appeal is, whether under the circumstances of this case, the abolishment of certain job positions constitutes a "minor" dispute[1] subject to the arbitration provisions of existing collective bargaining agreements, or whether such actions are a violation of the substantive provisions of the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* (RLA), the reparation of which may be sought by recourse to the courts.[2] The resolution of this dilemma will depend upon the answer given to the various subsidiary questions which we must first consider.

The case is another episode in the continuing labor saga of the Boston & Maine Railroad and related companies. *See Brotherhood of Maintenance of Way Employees* v. *Guilford Transportation Industries, Inc.*, No. 1366 (1st Cir., October 28, 1986). The facts are somewhat convoluted. We shall recount only those that are vital to the determination of the narrow issue presented. We, of course, are bound by the factual findings of the district court, unless we conclude that they are clearly erroneous. Rule 52(a), Fed. R. Civ. P.; *Anderson* v.

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[1] A "minor" dispute is one concerning the resolution of grievances regarding the interpretation or application of existing collective bargaining agreements. *Brotherhood of Railroad Trainmen* v. *Chicago River & Ind. R.R.*, 353 U.S. 30 (1957); 45 U.S.C. § 153. In contrast, a "major" dispute is one which arises from the formation or negotiation of changes to agreements regarding rates of pay, rules, or working conditions. *Elgin, J. & E. Ry.* v. *Burtey*, 325 U.S. 711, 722-28 (1945); 45 U.S.C. §§ 155-160. A "minor" dispute is subject to the primary jurisdiction of arbitration boards created by the Railway Labor Act. 45 U.S.C. § 153; *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U.S. 239 (1950).

[2] *See Airline Pilots Assoc.* v. *United Air Lines*, No. 85-2726 and 85-2833 (7th Cir., Sept. 29, 1986).

City of Bessemer City, N.C., —— U.S. ——, 105 S. Ct. 1504, 1511-1513 (1985).

I. *The nature of the controversy*

The Brotherhood of Maintenance of Way Employees (BMWE) is a labor organization which represents, for collective bargaining purposes, the maintenance of way employees of the Maine Central Railroad Company and Portland Terminal Company (hereinafter referred to jointly as "Maine Central"). This relationship has existed for some time and has been memorialized in collective bargaining agreements between the BMWE and Maine Central.

As is normal, with the passage of time the parties sought to make changes in the contracts. Thus, on April 2, 1984 the BMWE served notice on Maine Central of its intention to renegotiate various of the existing contractual provisions.[3] BMWE "sought primarily to achieve contract terms that would (1) afford greater job protection for BMWE membership than existed under the existing collective bargaining agreement and (2) limit the carrier's right to achieve reductions in the work force of contract labor by future job abolishments."[4] The propelling force behind these demands was the reduction of the maintenance of way employees from 350 to 400 in number during the 1981-82 period to 120 to 165 by October 1985.

The negotiations that followed were unfruitful. The parties exhausted the various steps provided for by the RLA and were thereafter released by the National Mediation Board (Board).[5]

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[3] *See* 45 U.S.C. § 156.

[4] *Railway Labor Executives Assoc.* v. *Boston & Maine Corp.*, No. 86-0122-P, slip op. at p. 7.

[5] *See generally Railroad Trainmen* v. *Terminal Co.*, 394 U.S. 369, 379 (1969). In September 1984, the Board entered the picture at

On November 13, 1985, before either party resorted to self-help, the BMWE and Maine Central entered into a stipulation whereby Maine Central "agreed to a moratorium on their proposed job abolishments." [6] Both parties also assented to postponing the exercise of self-help action until after February 28, 1986.

The parties continued to meet during the moratorium in an attempt to reach an agreement, but to no avail. The *status quo* stipulation expired on February 28, and thereafter, Maine Central abolished 15 to 20 maintenance of way positions. On March 3, BMWE initiated a strike against Maine Central. It also established pickets against Boston & Maine Corporation (B & M) and Delaware & Hudson Railway Company (D & H), which are related carriers by virtue of their mutual ownership by Guilford Transportation Industries, Inc., a holding company. *See Guilford Transportation Industries, Inc., supra.* Less than 2% of the contract employees of the carriers crossed BMWE's picket lines.

Immediately upon the establishment of BMWE's picket lines against Maine Central, that carrier informed all of its employees who held contract positions that their positions were temporarily abolished. The controversy further escalated. After B & M and D & H were picketed, they abolished all of the positions covered by collective bargaining agreements. All three carriers intended to restore the jobs upon termination of the strike.[7]

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the request of the BMWE. It proffered arbitration (*see* 45 U.S.C. § 155, First), but this procedure was rejected by the BMWE on October 2, 1985. Thereafter the Board notified the parties that pursuant to 45 U.S.C. § 155, First, the *status quo* must be maintained for 30 days, without resort to self help until after the expiration of that period.

[6] *Railway Labor,* slip op. at p. 7.

[7] The labor contracts in question gave the carriers the right to suspend the contracts temporarily in cases of "emergency," a labor dispute being considered such a contingency. *See* App. 131, 140.

On March 24, 1986, the appellees, the Railway Labor Executives' Association (RLEA),[8] filed the original complaint in this case in the U.S. District Court for Maine, seeking declaratory and injunctive relief to prevent Maine Central from taking discriminatory action against the striking employees. RLEA also sought to enjoin D & H and B & M from retaliating against the employees who refused to cross BMWE's picket lines. The carriers in their answer denied any such retaliation and specifically claimed that any actions taken by them were permissible under their collective bargaining agreement and that any claims to the contrary gave rise only to a "minor" dispute subject to the exclusive jurisdiction of arbitration boards created under 45 U.S.C. § 153.

Meanwhile, because of the spread in the conflict beyond the confines of the immediate combatants,[9] the Board on April 14 recommended to the President the appointment of an Emergency Board as provided for in the RLA.[10] The carriers became aware of this recommendation which, if followed, would result in the issuance of a back-to-work order which they believed would prevent their taking contemplated action, and decided to permanently abolish those positions which earlier it had only "temporarily" eliminated, a decision carried out on or about April 18, 1986.

Under the provisions of the existing collective bargaining agreements, senior employees whose positions were

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[8] RLEA is an association of the chief executive officers of the principal railway unions in the United States, some of which in turn represent the employees of the carriers here in question. RLEA has standing to sue on behalf of its membership pursuant to *Hunt* v. *Washington Apple Advertising Comm'n*, 432 U.S. 333 (1977).

[9] *See Guilford Transportation Industries, Inc., supra.*

[10] 45 U.S.C. § 160.

abolished could exercise "bumping" rights [11] over junior employees, but they were required within a certain time period, in some cases, to exercise displacement by physically entering the junior employee's work area to inform him or her of the replacement, and in all cases, to commence work at the next scheduled shift. Either way this could only be done by crossing the established picket lines, an action which most employees refused to take. Virtually none of the B & M and D & H employees honoring the BMWE's picket lines exercised their bumping rights within the contractual time limits.

The agreements also provided that an employee whose position was abolished, but failed to bump could place his name and address on a hiring list, if he or she did so within a specified time period. Although theoretically the failure to sign up could result in the employee's loss of seniority, this rule had not in the past been strictly enforced by any of the carriers.

On May 16, 1986, President Reagan issued Emergency Order No. 2559 establishing an emergency board to investigate the Maine Central labor dispute. *See* 51 Fed. Reg. 18429 (May 20, 1986). The order also provided that for sixty days, "no change, except by agreement of the parties, shall be made by the carrier or the employees *in the conditions out of which these disputes arose*" (emphasis supplied).

Upon the creation of the Emergency Board by the President, all of the labor organizations representing the carriers' employees made unconditional offers to return to work immediately. Maine Central accepted this offer and all striking employees returned to the positions they held before the strike and thereafter, retained them throughout the week of May 19th. During that week, however, Maine Central issued job abolishment notices to

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[11] To "bump" means for a senior employee to displace a more junior one by virtue of longevity in employment.

447 of its labor force covered by collective bargaining contracts, a figure which roughly coincided with the volume of business loss caused by the strike.

D & H and B & M, however, took the position that they would only hire after determining the carriers' work needs after the effects of the secondary pickets. These carriers then proceeded to post for bidding the needed positions, the ultimate result being that only about 50% of their pre-strike positions were reinstated.

On May 20, 1986, RLEA sought a temporary restraining order against D & H and B & M, claiming their actions violated the *status quo* provisions of the President's Order and Section 10 of RLA.[12] The district court ruled that said order did not cover either D & H or B & M. A request for a temporary restraining order against Maine Central was also denied, the court holding that Maine Central had made a substantial preliminary showing that the abolition of the positions in question was directly related to loss of business and revenues occasioned by the strike.

On May 27, 1986, the carriers unilaterally terminated the seniority of all employees who did not file their names and addresses in a timely fashion. But even then, the provision was not uniformly applied by the carriers. For example, although 145 B & M employees were notified of the seniority loss by that carrier, D & H did not apply that provision to its signalmen employees.[13] This provision was then selectively enforced by the carriers.

The substance of the RLEA's temporary restraining order allegations were repeated in an amendment to the complaint filed on June 16, 1986, which the carriers thereafter answered denying said contentions.

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[12] 45 U.S.C. § 160.

[13] Twenty-four out of the twenty-six signalmen failed to comply, yet none lost their seniority.

The district court's decision

The district court after a full trial on the request for a permanent injunction issued its opinion on July 11, 1986. It ruled that for purposes of Section 10 of the RLA and the *status quo* provisions of the Presidential Order, April 2, 1984 was the date when the "dispute" arose between the BMWE and the Maine Central. The court concluded that both Section 10 and the Presidential Order required that neither party to that dispute make any change, except by agreement, "in the conditions out of which the dispute arose." Citing *Detroit and Toledo Shore Line Railroad Co.* v. *United Transportation Union*, 396 U.S. 142, 153 (1969), the court found "that the status quo to which the parties are required by the Emergency Order to return is that manifested by the 'actual, objective working conditions and practices, broadly conceived, which were in effect' . . . immediately prior to the service of the section 6 notice on April 2, 1984. These encompass[ed] the rates of pay, work rules and conditions of employment provided for by the existing collective bargaining agreement and/or previously established practices . . . in effect before the 'dispute' arose." [14] The court then concluded that "after the return to work on May 19, [Maine Central], consistent with its status quo obligations, would have been justified in implementing an appropriately conceived and executed reduction in its work force based upon the actual economic conditions of the carriers' business after that date." [15] The Court ruled, however, that Maine Central had violated its Section 10 *status quo* obligations because it had singled out for abolishment "only those jobs held by those employees who (1) were of the contract labor force or (2) being contract laborers, had exercised their organizational rights against the carrier." [16] The court found that the

[14] *Railway Labor* at 24-25.

[15] *Id.* at 26.

[16] *Id.* at 28.

methodology used by the Maine Central was faulty because rather than focusing on the abolishment of jobs which contributed to the economic efficiency of the then current conditions, it "clearly selected jobs to be abolished so as to avoid retaining those employees who had not worked during the strike." [17] In the court's view, the carrier acted from a "predetermined, and improper, design to reduce the work force *by eliminating strikers as employees.*" [18]

The district court's analysis as to B & M and D & H rested on different grounds. First of all it concluded, reaffirming its prior ruling, *see ante* at 8-9, that the Presidential Order specifically identified Maine Central and the BMWE as the parties covered by its proscriptions, and thus did not apply to the D & H and B & M. The court ruled, however, that this was not determinative of those carriers' obligations to return their employees to work on May 16. The court held that these carriers' April 18 permanent job abolishments were carried out as an "anticipatory breach of those obligations which the carriers recognized they would incur under the [collective bargaining] agreements and the RLA provisions upon the ending of the strike." [19] This "anticipatory breach," the court ruled, violated "the carriers' section 2, First, obligation to exert every reasonable effort to maintain contracts." [20] The district court held that "the right of the[se] employees to . . . return to work was properly secured to them by the RLA provisions as well as by the terms of the collective bargaining agreement." [21] In conclusion the court determined "that the permanent job abolishments of April 18 were illegal," [22]

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[17] *Id.*

[18] *Id.* at 32, emphasis in the original.

[19] *Id.* at 35-36.

[20] *Id.* at 35.

[21] *Id.* at 36.

[22] *Id.* at 38.

and the employees affected were entitled to return to work whether or not they complied with the timely exercise of the contractual displacement rights.

The Court found that it was appropriate to grant back pay as a remedy to correcting Maine Central's *status quo* violations. It also found that remedy appropriate against D & H and B & M "because of their illegal conduct and to secure to the employees meaningful relief *for the violation of their collective bargaining rights* since May 16, 1986." [23]

Appellant carriers challenge the district court's ruling principally on the ground that the disputes are "minor" ones, involving the interpretation of the collective bargaining contracts, and thus subject to the exclusive jurisdiction of the adjustment boards. In our view, because the Maine Central controversy presents different underlying legal principles than that involving D & H and B & M, it is subject to a different analysis and results.

The Maine Central dispute

Basic to Maine Central's argument is its contention that the job abolishments after the Presidential Order went into effect, were actions "arguably" warranted by the existing collective bargaining contract. This argument is premised on a line of cases decided in this circuit, starting with *Airlines Stewards and Stewardesses Ass'n* v. *Caribbean Atlantic Airlines, Inc.*, 412 F.2d 289 (1st Cir. 1969), in which we held that "where the railroad asserts a defense based on the term of the existing collective bargaining agreement, the controversy may not be termed a major dispute unless the claimed defense is so obviously insubstantial as to warrant the inference that it is raised with intent to circumvent the procedures perceived by § 6 for alteration of existing agreements." *Id.* at 291. We further refined this test in *Carbone* v.

[23] *Id.* at 40. Emphasis supplied.

Meserve, 645 F.2d 96 (1st Cir. 1981), in which we stated that if it is even "arguable" that the railroad's action was one warranted by the collective bargaining contract and not one without any basis in the contract, the dispute was a "minor" one subject to the adjustment board's exclusive jurisdiction. As recently as April 19, 1986, we reaffirmed the *Carbone* statement when we said that "our task is not to arbitrate this dispute, but to determine if 'it is even arguable' that the railroad's action was warranted by the contract." *Brotherhood of Locomotive Engineers* v. *Boston & Maine Corp.*, 788 F.2d 794, 798 (1st Cir. 1986).

As the district court correctly ruled, for purposes of Section 10 and the Presidential Order, April 2, 1984 is the crucial date in determining the conditions that must prevail regarding the *status quo*. It is the "actual, objective working conditions and practices, broadly conceived," [24] existing on that date that are the standard for the parties' *status quo* obligations.

Focusing on that date, it is undisputable that Maine Central had the contractual right to abolish jobs permanently. In fact, as previously indicated in this opinion, it was the BMWE's desire to curtail Maine Central's contractual rights to so act that caused BMWE to serve the April 2, 1984 notice on Maine Central in the first place. Thus Maine Central's right to carry out job abolishments, even after the Presidential Order, remained unaffected because that right *was* part of the *status quo*.

If the sole issue presented to the district court were one in which the issue was whether or not Maine Central had the right under the collective bargaining contract to abolish jobs, we would unquestionably be required to reverse that court and to order submission of that controversy to arbitration before the adjustment board.

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[24] *Detroit and Toledo Shoreline Railroad Co., supra.*

Such a question would clearly involve a "minor" dispute requiring the interpretation or application of an existing collective bargaining agreement. *Brotherhood of Railroad Trainmen, supra.* But the framing of the Maine Central issue in such terms is obviously a red herring. No one, except Maine Central in its obfuscation of the questions presented, claims that is an issue or that Maine Central lacks the power to abolish jobs pursuant to the collective bargaining agreement after the Presidential Order of May 20, 1986. RLEA *agrees* that Maine Central has that contractual right (*see* Appellee's Brief at page 23), and the district court *specifically so ruled.*[25]

The real question as respects the Maine Central controversy is whether a claim that the carrier has discriminated against its employees because they have engaged in activities protected by the RLA falls within the jurisdiction of the adjustment boards, or whether such an allegation may be brought in the courts. Contrary to Maine Central's assertion, the cases cited above, *see ante* at 13-14—holding that a contract defense renders a dispute minor, rather than major, so long as the claimed defense is arguable—are inapposite. The case against Maine Central presents a claim of *statutory* violation. In our opinion such a controversy involves the substantive rights protected by the RLA and is within the competency of the district courts because these are claims that cannot be resolved by interpretation of the collective bargaining agreement. *Railroad Trainmen* v. *Howard,* 343 U.S. 768, 774 (1951) ("The claims here cannot be resolved by interpretation of a bargaining agreement so as to give jurisdiction to the Adjustment Board . . ."); *Conrad* v. *Delta Air Lines, Inc.,* 494 F.2d 914, 917-918 (7th Cir. 1974) (suit alleging that RLA was violated by discharge motivated by anti-union animus states a judicial claim and is not committed to the jurisdiction of adjustment board because it does not arise from differing

[25] *See ante* at 10.

interpretations of collective bargaining agreements); *Air Line Pilots Association* v. *United Air Lines, Inc., supra,* (same); *Intern. Ass'n of Machs., etc.* v. *Northwest Airlines,* 494 F.2d 914, 918 (7th Cir. 1974) (same, dicta); *Brotherhood of Railroad Train.* v. *Central of Ga. Ry. Co.,* 305 F.2d 605, 607-609 (5th Cir. 1962) (same); *Brotherhood of Railroad Trainmen* v. *Smith,* 251 F.2d 282, 284-286 (6th Cir. 1958) (same). *See also Stepanischen* v. *Merchants Despatch Transp. Corp.,* 722 F.2d 922, 924-927 (1st Cir. 1983).

Section 3 of the RLA [26] establishes adjustment boards for the purpose of arbitrating "disputes between an employee or group of employees and a carrier or carriers growing out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." 45 U.S.C. § 153, First (i). This language clearly *limits* the grievances which mandatorily must be submitted to the adjustment boards to those arising out of the collective bargaining agreement. *Elgin, J. & E.R. Co.* v. *Burley,* 325 U.S. 711, 723-726 (1944). This of course, includes discharge disputes which "arguably" grow out of grievances or contract interpretation. *Radin* v. *United States,* 699 F.2d 681 (4th Cir. 1983). But, where the terms of a contract or rights arising therefrom are not at issue, but rather the claims involve statutory obligations imposed by the RLA, discriminatees, even though covered by collective bargaining contracts, have available judicial remedies to enforce their *statutory* rights. *Railroad Trainmen* v. *Howard, supra*; *Conrad* v. *Delta Air Lines, Inc., supra*; *Steele* v. *L. & R. Co.,* 323 U.S. 192 (1944); *Mavis* v. *Brotherhood of Ry., Airline & S.S. Clerks,* 585 F.2d 926, 928 (8th Cir. 1978); *Airline Pilots Assoc.* v. *United Airlines, supra.*

Appellants have not pointed to any contractual provision giving the adjustment boards jurisdiction over *this* type of controversy, i.e., a claim of an RLA violation.

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[26] 45 U.S.C. § 153.

Curiously enough, neither party offered into evidence the arbitration clause of the collective bargaining agreement.[27] We thus must assume that there is nothing definitive in the contract at the very least indicating the intention of the parties to submit statutory violations to arbitral jurisdiction.[28]

Where a case such as this one presents a claim of violation of the RLA and a defense that the challenged action was permitted by the collective bargaining agreement, the district court must *weigh and assess the merits* of the parties positions to determine the question of *its jurisdiction. International Association of Machinists & Aerospace Workers* v. *Northwest Airlines*, 673 F.2d 700 (3d Cir. 1982) (suggesting in detail the analysis that a district court should undertake). If the court finds merit to the claim that substantive rights protected by the RLA are at stake, the controversy is properly before the district court. *See Railroad Trainmen* v. *Howard, supra,* and other cases cited *ante* at pp. 15-16.

The RLEA alleged, and the district court found, that Maine Central chose to abolish the jobs of those employees who had engaged in protected activity. This finding is supported by the evidence and must be honored by this appellate court. Rule 52(a), Fed. R. Civ. P. There is no question but that such action is contrary to the rights of employees as established in Section 2, Fourth, of the RLA.[29] It is fallacious to contend that the abolishment

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[27] *See Railway Labor* at p. 27 n.9.

[28] We leave for another day the validity of such contractual provision in the context of the RLA. *Compare Barrentine* v. *Arkansas-Best Freight Systems*, 450 U.S. 728 (1980) (employees with claims under the Fair Labor Standards Act are not required to proceed through collective bargaining arbitration but may file action in court); *Alexander* v. *Gardner-Denver*, 415 U.S. 36 (1973) (same result as regards Title VII claims).

[29] 45 U.S.C. § 152, Fourth:

> Employees shall have the right to organize and bargain collectively through representatives of their own choosing. . . . No

by the Maine Central of job positions *in retaliation for the employees' having engaged in activities protected by the RLA* is warranted by the collective bargaining agreement. Maine Central points to no such language, and were such a provision to exist, it would be clearly invalid as contrary to law. 29 U.S.C. § 152, Fourth.

The district court was thus correct in assuming jurisdiction over the Maine Central suit. As seen above, however, the legal basis for affirming jurisdiction over the Maine Central dispute is validated on somewhat different grounds than those used by the district court.

The remedy

The district court issued an injunction reinstating Maine Central's employees and ordering back pay to all employees who were not returned to service after the end of the strike, and to all employees who were returned but were thereafter furloughed by reason of the May 19 job abolishments. Such a remedy is, on its face, appropriate to correct Maine Central's discriminatory actions.

Maine Central challenges the back pay implementation alleging that even if the job abolishments were properly invalidated, full back pay for the entire 50-day period between May 19 and July 14 (when these employees were reinstated in compliance with the court's order) will give the employees a "windfall," because they should only receive back pay to the date when they would have validly

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carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization....

been terminated in the absence of anti-union animus. *See Mastell Trailer Corp.* v. *N.L.R.B.*, 682 F.2d 753, 755-56 (8th Cir. 1982). Maine Central points to the fact that after the judgment was entered in this case, the district court approved, and the Maine Central carried out, a number[30] of job abolishments, after giving the specified advance notice. Maine Central thus claims that on May 19, the most that those employees whose jobs were abolished with court approval were entitled to was the 5 days' pay equivalent to the contractual advance notice requirement. Appellee's arguments to the contrary are vague, confusing and not convincing.

There is no question but that the purpose of equitable relief of the nature here in question is to make the aggrieved party whole. As previously stated, the remedy granted, on its face, does not appear inconsistent with that principle. The implementation of that remedy, however, may be another matter.

Although the district court stayed the back pay remedy pending this appeal, the parties have pointed to no definitive ruling of the district court on this issue nor do we find one in the record before us. Because questions of compliance with a decree are best handled at the trial level, we are of the view that the interpretation of the decree in question is best left, in the first instance, to the issuing court. Thus the question raised regarding the appropriate back pay due is remanded to the district court for reexamination.

The dispute of D & H and B & M

As previously indicated, the district court's ruling as to D & H and B & M's actions stand on a different footing. It did not find the job abolishments a violation of the Presidential Order, because the order was inapplica-

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[30] Although a total of 725 jobs were abolished, it is not clear from the record, how many of these were Maine Central positions or contract positions.

ble to them. Furthermore no discriminatory motive was attributed to these carriers, or at least no finding to such effect underlies the court's conclusions. Instead the court ruled that they engaged in an "anticipatory breach" of the collective bargaining agreements and of Section 2, First of the RLA[31] by failing to maintain said agreements. The court concluded that it had jurisdiction to hear such a controversy and ruled for plaintiffs.

The district court's opinion is significantly bare of any citations in support of this ruling. It would seem that *any* breach of an existing collective bargaining agreement, whether "anticipatory" or otherwise, is precisely what an arbitrable "minor" dispute is concerned with. *Brotherhood of Railroad Trainmen* v. *Chicago River & Ind. R.R., supra.* Whether a party is in breach of a collective bargaining agreement, "anticipatorily" or not, requires "the interpretation [and] or application" of that agreement. *See* 45 U.S.C. § 153, First (1). Where such application or interpretation is central to the attempted exercise of allegedly existing rights, a "minor" dispute exists which should be litigated before the adjustment boards. *Illinois Central R. Co.* v. *Brotherhood of R.R. Trainmen,* 398 F.2d 973 (6th Cir. 1968).

It is undisputed that D & H and B & M had the contractual right to abolish jobs. The action that they took was "arguably" within their contractual rights. Any challenge to this action which is not based on a violation of specific statutory rights, is without the court's juris-

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[31] 45 U.S.C. § 152, First:

> It shall be the duty of all carriers, their officers, agents and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

diction and must be processed before the adjustment boards. *Caribbean Atlantic Airlines Inc., supra; Carbone, supra; Brotherhood of Locomotive Engineers, supra.* The decision of the district court as to the D & H and B & M dispute is thus reversed and remanded with instructions that it be referred to the appropriate adjustment boards.

The decision of the district court is affirmed in part, reversed in part, and remanded for action consistent with this opinion.

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Civil No. 86-0122-P

RAILWAY LABOR EXECUTIVES ASSOCIATION,
Plaintiff

v.

BOSTON & MAINE CORPORATION,
DELAWARE & HUDSON RAILWAY COMPANY,
MAINE CENTRAL RAILROAD COMPANY, and
PORTLAND TERMINAL COMPANY,
Defendants

Civil No. 86-0194-P

THE BOSTON & MAINE CORPORATION,
DELAWARE & HUDSON RAILWAY CO.,
MAINE CENTRAL RAILROAD COMPANY, and
PORTLAND TERMINAL COMPANY,
Plaintiffs

v.

UNITED TRANSPORATION UNION,
SHEETMETAL WORKERS INTERNATIONAL ASSOCIATION,
BROTHERHOOD OF RAILROAD SIGNALMEN,
BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
BROTHERHOOD OF RAILWAY CARMEN,
INTERNATIONAL BROTHERHOOD OF BOILERMAKERS,
IRON SHIP BUILDERS, BLACKSMITHS, FORGEMEN
& HELPERS,
BROTHERHOOD OF RAILWAY, AIRLINE &
STEAMSHIP CLERKS,
INTERNATIONAL BROTHERHOOD OF FIREMEN & OILERS,
INTERNATIONAL ASSOCIATION OF MACHINISTS, and
INTERNATIONAL ASSOCIATION OF ELECTRICAL WORKERS,
Defendants

(Transferred from U.S. District Court, District of Massachusetts, and Consolidated)

FINDINGS OF FACT, CONCLUSIONS OF LAW, OPINION AND ORDER ON PLAINTIFF'S COMPLAINT FOR PERMANENT INJUNCTION

CARTER, District Judge

I. *Procedural Background*

This is an action arising under the Railway Labor Act (hereinafter "RLA"), 45 U.S.C. §§ 151, *et seq.* The Plaintiff, Railway Labor Executives' Association (hereinafter "RLEA"), is a voluntary, unincorporated association of the Chief Executive Officers of nineteen standard labor organizations which collectively represent virtually all organized railroad employees in the nation.

The Defendants are common carriers by railroad engaged in interstate commerce. Boston & Maine Corporation (hereinafter "B&M") transports passengers in Massachusetts and Vermont and freight in New York, Massachusetts, Maine, New Hampshire, Vermont and Connecticut. Delaware & Hudson Railway Company (hereinafter "D&H") transports freight in New York, Pennsylvania, New Jersey, Maryland and Virginia. Maine Central Railroad Company (hereinafter "MEC") transports freight in Maine, New Hampshire and Vermont. Portland Terminal Company (hereinafter "PT") provides switching and terminal services in Portland, Maine. MEC, D&H and B&M are owned by Guilford Transportation Industries, Inc. (hereinafter "Guilford"), which is headquartered in North Billerica, Massachusetts. PT is a wholly-owned subsidiary of MEC. Together, MEC/PT, D&H and B&M constitute the Guilford Rail System.

This matter is now before the Court for adjudication on the merits of the Plaintiff's claim for a permanent injunction requiring the four carrier Defendants in Civil No. 86-0122-P to restore the status quo of the relationship between *each* carrier and its contract labor force

pursuant to section 10 of the RLA (45 U.S.C. § 160). The labor dispute which underlies this claim arose out of negotiations prior to April 2, 1984, between the Maine Central Railroad Company and its wholly-owned subsidiary, Portland Terminal Company, (hereinafter "MEC/PT") and the Brotherhood of Maintenance of Way Employes (hereinafter "BMWE").

Action Civil No. 86-0122-P, was commenced by the RLEA on March 24, 1986, in this Court by a Complaint that sought, *inter alia*, preliminary and permanent injunction relief protecting the rights of the membership of the unions throughout the Guilford system to honor BMWE picket lines established at the property of any Guilford carrier and to enforce the carrier's obligations under section 2, First of the RLA to exert every reasonable effort to maintain existing agreements. Action Civil No. 86-0194-P was originally commenced by the Guilford carriers in the United States District Court for the District of Massachusetts on April 26, 1986, by a Complaint which sought preliminary and permanent injunctive relief against the memberships of some eleven craft unions barring those memberships from, *inter alia*, any picketing of or work stoppage against the Guilford carriers "over the carriers' April 21, 1986, notices or the subject matter of those notices."[1] Complaint at 6-7. A Tem-

[1] The April 21, 1986 notice referred to is Plaintiff's Exhibit 10(a). That is the notice which was sent to all the employees represented by the fifteen unions representing employees of one or more of the four Guilford carriers. The notice was also sent to the General Chairman of each of those unions. The notice provided as follows:

> This constitutes notice that you are expected to report back to work on or before April 25, 1986. Employees who are not reporting for work or whose assignment has been abolished as well as employees furloughed prior to the strike should contact their supervisor for assistance in reassignment or other instruction. The seniority rights of employees who return will be observed, except that employees who have chosen not to

porary Restraining Order was entered therein by Keeton, D.J., on April 26, 1986, enjoining both parties from implementing any self-help in respect to the April 21, 1986 notices of the carriers. On May 13, 1986, with the consent of the parties, the TRO was extended by Wolf, D.J., until decision on the Plaintiffs' motion for a preliminary injunction. Judge Wolf filed a Memorandum and Order on May 5, 1986, staying further proceedings in the matter in the United States District Court for the District of Massachusetts until this Court could decide whether these matters should proceed together in the District of Maine or the District of Massachusetts.

On May 16, 1986, this Court entered its Memorandum of Opinion and Order, denying in Civil No. 86-0122-P the Defendant's motion to transfer the case to the United States District Court for the District of Massachusetts. On the same day, the President issued Executive Order No. 12557, which established Emergency Board No. 209 pursuant to section 10 of the RLA to investigate the controversy between the parties and report to the President concerning the dispute. On May 22, 1986, Judge Wolf entered an Order in Civil No. 86-0194-P (then C.A. No. 86-1327-W on the docket of the Massachusetts Court),

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work to this date will not be allowed to displace a junior employee with an employment relationship prior to March 4, 1986, who has been reporting to work.

The assignments of employees who choose not to report back to work on or before April 25, 1986, will be filled with permanent replacements as required by the carrier.

Plaintiff's Exhibit 10(a). The notice was issued to employees of D&H and B&M at a time when none of them were striking their employers but when they had been for a period of time respecting secondary picket lines put up by BMWE employees of MEC/PT. It was this notice which precipitated threats of strikes against B&M and D&H by their respective employees and the commencement of the Massachusetts action, now Civil No. 86-0194-P, by the Guilford carriers resulting in the issuance of Judge Keeton's Temporary Restraining Order of April 26, 1986, entered therein.

transferring that case to this court for joinder with Civil No. 86-0122-P, pursuant to this Court's Order of May 16, 1986.

This Court endorsed, on May 23, 1986, with the consent of counsel, the Plaintiffs' then pending motions for preliminary injunctive relief as requiring no Court action because they had been rendered moot by the Executive Order creating Emergency Board No. 209. The members of the Board were appointed on that same day, and since that time hearings have been held by the Board which resulted in the issuance on June 20, 1986, of the Report to the President by Emergency Board No. 209. (Defendants' Exhibit 55.) The Temporary Restraining Order entered by Judge Keeton, as extended by the terms of the Consent Order entered by Judge Wolf, expired on June 2, 1986. The cases were consolidated for further proceedings by a Bench Order.

Plaintiffs in the consolidated matters, on May 19, 1986, filed a motion for a new temporary restraining order requiring the Guilford carriers to observe the status quo created by section 10 of the RLA with the issuance of the aforesaid Executive Order. This motion was denied by the Court's Order filed on May 23, 1986. Plaintiff had filed on May 20, 1986, a motion for a preliminary injunction to the same effect and an amendment to the Complaint, seeking a permanent injunction to that effect. After pretrial conferences and discovery, these requests were set for hearing to commence on June 18, 1986. At the commencement of the hearing, the Court granted, over the Defendants' objections, the Plaintiff's motion to amend the Complaint and its motion to advance the trial on the merits of Plaintiff's claim for a permanent injunction and to consolidate that trial with the hearing on the preliminary injunction. The hearing was held in the period June 18-24, 1986. The matter is now properly postured for adjudication of the Plaintiff's claim for a permanent injunction.

II. *Findings of Fact*

On April 2, 1984, in compliance with section 6 of the Railway Labor Act (45 U.S.C. § 156), the BMWE served notice on MEC/PT of its desire to accomplish changes in numerous provisions of the existing collective bargaining agreements. For purposes of section 10, this is when the "dispute" arose. In negotiations leading up to this notice BMWE attempted to obtain a protective-type agreement to stanch the massive furlough practices of MEC/PT in respect to maintenance of way employees. Tr., Vol. 2, at 2.[2] In 1981-82 there were 350 to 400 maintenance of way employees during the carrier's peak seasonal period. By October 1985 the size of that work force was 120 to 165. *Id.* at 2-3. The section 6 notice sought primarily to achieve contract terms that would (1) afford greater job protection for BMWE members than existed under the existing collective bargaining agreement and (2) limit the carrier's right to achieve reductions in the work force of contract labor by future job abolishments.

The parties did not resolve the dispute through negotiations, and on September 19, 1984, the BMWE applied to the National Mediation Board (hereinafter "NMB") for its assistance. Mediation followed, and on September 26, 1985, in accordance with section 5, First (45 U.S.C. § 155, First) of the Railway Labor Act, the NMB proffered arbitration which was declined by BMWE on October 2, 1985. The NMB notified the parties that they were required to maintain the status quo for thirty days without resort to self-help under section 5, First, of the Act (45 U.S.C. § 155, First).

The parties, MEC/PT and BMWE, entered into an agreement dated November 13, 1985, (Plaintiff's Exhibit 1) by which the Carrier agreed to a moratorium on then-

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[2] The Court has numbered the volumes of the original transcript in red numerals. Citations to the transcript refer to these volume designations and to page designations.

proposed job abolishments and both parties agreed, *inter alia*, to a moratorium on the exercise of self-help through February 28, 1986. Under this moratorium agreement, as of November 18, 1985, there was a combined maintenance of way work force of 123 on MEC/PT. *Id.* at 6. The moratarium agreement expired on February 28, 1986, and on that date both sides were free to resort to self-help. *Id.* at 5.

The parties met on several occasions, the last being March 3, 1986, and were unable to resolve their differences. On February 28, 1986, MEC/PT abolished 15 to 20 maintenance of way positions. *Id.* at 33-34. In response to that action, on March 3, 1986, BMWE exercised self-help and initiated a strike against PT and established pickets against it. On March 4, BMWE struck and established pickets against MEC. *Id.* at 8. On March 5, BMWE established pickets against B&M and on March 17 initiated pickets against D&H. *Id.* BMWE did not strike against B&M and D&H. *Id.* at 12. Less than two percent of the contract employees of the four carriers crossed BMWE's picket lines. *Id.* at 9.

Immediately upon the establishment of picket lines on MEC/PT, all employees who held a position that was covered by a collective bargaining agreement and who honored the picket lines were informed by the carrier that their positions were temporarily abolished. *Id.* at 170, 174. After the picketing began on B&M and D&H those carriers, on or about April 2, 1986, also abolished all of their contract labor positions. Cronin Dep., 5/29/86, at 19. These early job abolishments were intended to be temporary in nature and it was the carrier's intent that the jobs be restored upon termination of the strike. *Id.* While the strike against MEC/PT was in progress all four carriers suspended their labor contracts. Tr., Vol. 2, at 193. Once the strike ended, the labor contracts were intended to go back into place. *Id.* at 193-94.

Various legal proceedings were commenced by the carriers and BMWE further extended its self-help action to selected railroads beyond the confines of the Guilford system. Between April 9 and 14, 1986, the carriers became aware that the American Association of Railroads had recommended to the NMB that it ask the President to appoint an Emergency Board. *Id.* at 194. The carriers were also aware on April 14 that the NMB had in fact asked the President to appoint an Emergency Board. *Id.* at 195. After they became aware of this, and believing that the appointment of an Emergency Board and issuance of a back-to-work order was imminent, the carriers decided to permanently abolish the positions of all employees who were honoring BMWE's picket lines and did so on or about April 18, 1986. The employees whose jobs were permanently abolished were the same employees whose positions were earlier temporarily abolished for the term of the strike. *Id.* at 195-96; Cronin Dep., 5/29/86, at 18. No employee who crossed BMWE's picket lines had his/her position abolished. Cronin Dep., 5/29/86, at 17.

Regardless of the various reasons given for these abolishments by the carrier, the Court finds that *the effect* of the permanent abolishments was to discriminate against employees who exercised their rights to honor picket lines. The fact that only employees who honored BMWE's picket lines had their jobs abolished leads the Court to conclude that the purpose of this action was to discriminate against and to punish employees who had continued to honor BMWE's picket line.

On April 21, 1986, the carriers sent a notice bearing that date to all employees who were honoring BMWE's picket lines. *See, supra,* at 3, n. 1. The implementation of the policy established by the notice resulted in any employee who had up to that time exercised the right to honor the BMWE picket lines and who did not return to work by April 25 losing all displacement rights under

the collective bargaining agreement against employees who had worked during the strike.

Contract provisions and past practices on all the carriers require that an employee whose position has been abolished exercise his seniority by displacing a more junior employee from an unabolished position within a specified period. Cronin Affidavit, ¶ 4; Tr., Vol. 2, at 24, 60. This practice is known as "bumping" or "bunting." At some locations on B&M's property, to exercise a "bump," an employee must physically go into the junior employee's work area, tap him on the shoulder and inform him that he is being displaced. If a picket line is in place, that requires the senior employee to cross a picket line in order to exercise his displacement right. *Id.* at 431-33. On all of the carriers, after exercising displacement rights by "bumping," the senior employee must be able to commence at the next scheduled shift performance of the job responsibilities of the junior employee who has been displaced by the "bump." Cronin Dep., 6/4/86, at 25. To do so, he is obviously required to cross any picket line that may be in place.

During the strike, the carriers insisted on compliance with the bumping rule. The rigid application of these rules, while the strike or secondary picketing was going on, forced the senior employees to choose between their right to honor a union picket line and their seniority and displacement rights. Virtually none of the B&M and D&H employees honoring BMWE's picket lines whose positions were permanently abolished on or about April 18, 1986, exercised their seniority displacement rights by "bumping" junior employees within the time limits under their respective labor agreements. *Id.* at 33.

The subject labor agreements also require that an employee whose position is abolished and who does not exercise his displacement rights in a timely fashion file his name and address with the carrier within a specified period of time. The agreements provide that a failure to

do so can result in the loss of that employee's seniority. *Id.* at 31-32. This rule has not been strictly enforced in the past on any of the carriers.

The evidence discloses a past instance of a maintenance of way employee having his seniority terminated because of failure to comply with the rule. Tr., Vol. 2, at 25, 56, 365. The evidence also discloses that on January 29, 1985, the MEC/PT eliminated the seniority of 17 employees for failure to comply with the rule while carrying out a review to update seniority rosters. This seniority termination rule is not automatically or summarily imposed under past practice. On the B&M, for example, it was usual practice for such terminations to be conferenced between management and the union representative and BMWE would be given an opportunity to notify individuals who had not filed their names and addresses of the danger to their seniority. In fact, this is the practice that was followed in connection with the January 29, 1985, seniority terminations. Tr., Vol. 4, at 17-18.

This prior practice was disregarded when the carriers on May 27, 1986, unilaterally terminated the seniority of all employees who did not file their names and addresses in a timely fashion during the strike following a failure to exercise their displacement rights. The effect of this decision is that 145 BMWE employees on the B&M were notified that their seniority had been terminated. Tr., Vol. 2, at 26. The D&H did not apply the seniority termination rule in question against its Brotherhood of Railroad Signalmen employees. Twenty-four out of twenty-six employees did not file their names and addresses, but none of those twenty-four had their seniority terminated. *Id.* at 408. Thus, it is apparent that the carriers selectively enforced this contract provision.

Immediately upon learning that the President had created an Emergency Board in respect to the dispute between MEC/PT and its employees, the RLEA, on be-

half of all labor organizations on the carriers' properties, made unconditional offers to all four carriers for an immediate return to work. *Id.* at 10-11, 211; Plaintiff's Exhibits 2, 3. On May 19, 1986, the MEC/PT allowed all of their striking employees to return to the positions they had held before the strike and retained them throughout the week of May 19th. During that week, however, the carrier issued job abolishment notices applicable to 44 percent of the contract labor force. Peters Affidavit, ¶¶ 2, 3; Tr., Vol. 4, 119.

The B&M and D&H, however, did not recall their entire pre-strike work force. Those carriers took the view that their labor agreements continued to be suspended until determinations could be made as to the number of contract employees required to operate after cessation of the secondary picketing against those carriers and the requisite number of positions could be bulletined for bidding and an award could be made. Tr., Vol. 2, at 212-15. This process took slightly in excess of five days, during which period those carriers continued to use management personnel and replacement employees hired during the secondary picketing to do contract work. *Id.* at 212-13. Ultimately, through the process of bulletining and award of positions, the D&H restored approximately 50 percent of its pre-strike positions, while the B&M restored approximately 55 percent. Carr Affidavit, at 2.

Further findings of fact will be made in the course of the discussion of specific issues as such findings may be pertinent to the discussion.

III. *The Applicable Legal Standards Under the Railway Labor Act*

A. *The Obligations Imposed by the Act*

All of the carriers which are parties to this action, and all of their employees, are subject to the statutory obligation set forth in section 2, First, of the Railway Labor Act, which requires them

> to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes . . . in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

45 U.S.C. § 152, First. This duty, which is "central to the effective working of the Railway Labor Act," is a legal obligation "enforceable by whatever means might be developed on a case-by-case basis." *Chicago & Northwest Railway Co. v. United Transportation Union*, 402 U.S. 570, 577, 578 (1971); *see also Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 377-78 (1969).

Beyond the general obligation imposed by section 2, First, the RLA provides two different avenues for the resolution of disputes between carriers and labor organizations depending upon whether those disputes are "minor disputes" or "major disputes." *See, e.g., Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711 (1944). The Court of Appeals for the First Circuit recently summarized the well-settled law with respect to major/minor disputes as follows:

> A minor dispute contemplates an existing agreement and a disagreement regarding "the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case." [Citations omitted.] Such disputes are entrusted exclusively to arbitration by the National Railroad Adjustment Board (NRAB). 45 U.S.C. § 153, First. A district court has no jurisdiction over such disputes, and thus a party may not obtain a status quo injunction.

Brotherhood of Locomotive Engineres v. Boston & Maine Corporation, 788 F.2d 794, 797 (1st Cir. 1986). Thus,

where a dispute is minor for purposes of the RLA, a carrier may continue to apply its interpretation of the agreement during the period of mandatory arbitration and no strikes are permitted over that particular issue during the pendency of the minor dispute. *Id.* A district court has no jurisdiction to enjoin conduct which is the subject of a minor dispute in an effort to resolve the dispute.[3]

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[3] The carriers have vigorously contended that each action of each of the carriers challenged by the Plaintiff generates only a "minor dispute" under the RLA, and as such is subject to the exclusive jurisdiction of the Adjustment Board. The claim is that the Court is without jurisdiction to adjudicate these challenges because they raise issues concerning the interpretation and application of the existing collective bargaining agreements. This contention fails for two reasons.

First, the specific conduct on which the Court herein adjudicates the carriers to be in violation of their obligations under section 10 and section 2, First, respectively, of the RLA clearly arises out of and continues the "major dispute," which was the subject of the BMWE's section 6 notice against the MEC/PT. The essence of that "major dispute" was the BMWE's quest to change the work rules and working conditions to afford its members greater protection against the carriers' program of work force reductions through job abolishments. The conduct on which the Court adjudicates the MEC/PT to be in violation of their section 10 obligations is the implementation of the post-May 19 work force reductions through a program of job abolishments by those carriers. The conduct for which the B&M and D&H are found to be in violation of their section 2, First, obligations is their implementation of the permanent job abolishments of April 18, 1986. The carriers thus are found in violation of the RLA provisions for the same conduct which precipitated the "major dispute" of April 2, 1984, (e.g., accomplishing work force reductions by a program of job abolishments). That conduct continues the carriers' assertion of its position in the original "major dispute" and as such is an extension of it. Thus, the issues that are the basis of the dispositive adjudication of this case against each carrier are precipitated by "major disputes." Hence, the Court's line of analysis and predicate for its decision does not entrench upon the "minor dispute" jurisdictional prohibition.

Second, the carriers' focus on this jurisdictional issue is overly large in scope. Clearly, the Court may not decide questions arising

A major dispute, on the other hand, "relates to the formation or modification of the collective bargaining agreement, including disputes over rates of pay, rules, or working conditions." *Id.* Section 2, Seventh, of the RLA, 45 U.S.C. § 152, Seventh, prohibits the carriers from changing "the rates of pay, rules or working conditions" of employees except in accordance with the strictures and procedures of section 6 of the RLA, 45 U.S.C. § 156. Thus, "if a district court finds the existence of a major dispute, it may enjoin either party from altering the status quo during the course of the negotiated proceedings mandated by section 6 of the RLA." *Brotherhood of Locomotive Engineers v. Boston & Maine Corp.*, 788 F.2d at 797.

The statutory proceedings required in order to accomplish changes in agreements pursuant to section 6 are described as "purposely long and drawn out, based on the hope that reason and practical considerations will

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out of interpretation or application of existing terms of the collective bargaining agreement *for the purpose of providing contract relief or enforcing the specific contract provisions.* Such matters are clearly committed to the jurisdiction of the Adjustment Board. Here, however, the Court addresses a larger question: whether the carriers have violated their obligations under the RLA provisions. Such issues are clearly within, are in fact committed to, the jurisdiction of the Court. The fact that such larger issues may touch upon, or may even subsume, lesser issues involving contract interpretation and/or application does not oust the Court of its jurisdiction over issues properly within the ambit of its statutory authority under the RLA. The contrary conclusion would prevent the Court from ever considering any conduct of the carrier alleged to be in violation of the RLA provisions which also arguably could involve a question of interpretation or application of the existing contract. Indeed, most efforts to change work rules and working conditions, within the scope of section 6, could well, and usually will, also precipitate questions as to whether existing contract terms permit the attempted changes. The rule for which the carriers here contend is so overly broad in its scope that its application could well totally abolish the jurisdiction of the Court over alleged violations of the RLA provisions.

provide in time an agreement that resolves the dispute." *Railway Employees v. Florida East Coast Railway Co.*, 384 U.S. 238, 246 (1966). *See also Detroit and Toledo Shore Line Railroad Co. v. United Transportation Union*, 396 U.S. 142, 149 (1969). The procedures brought to bear by section 6 were comprehensively described by Justice Harlan:

> The Act provides a detailed framework to facilitate the voluntary settlement of major disputes. A party desiring to effect a change of rates of pay, rules, or working conditions must give advance written notice. § 6. The parties must confer, § 2[,] Second, and if conference fails to resolve the dispute, either or both may invoke the services of the National Mediation Board, which may also proffer its services sua sponte if it finds a labor emergency to exist. § 5[,] First. If mediation fails, the Board must endeavor to induce the parties to submit the controversy to binding arbitration, which can take place, however, only if both consent. §§ 5[,] First, 7. If arbitration is rejected and the dispute threatens "substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President," who may create an emergency board to investigate and report on the dispute. § 10. *While the dispute is working its way through these stages, neither party may unilaterally alter the status quo.* §§ 2[,] Seventh, 5[,] First, 6, 10.

Railroad Trainmen v. Terminal Co., 394 U.S. 369, 379 (1969) (emphasis added). The exhaustion of the section 6 procedures is intended to be "an almost interminable process," during which the parties bear the obligation to "make every reasonable effort to negotiate a settlement and to refrain from altering the *status quo* by resorting to self-help while the Act's remedies [are] being ex-

hausted." *Detroit and Toledo Shore Line Railroad*, 396 U.S. 149.

The Act's status quo requirement "is central to its design." *Id.* at 150. It is significant that the United States Supreme Court in *Detroit and Toledo* spoke of "the Act's status quo requirement," *id.* at 150, while noting the existence of "three status quo provisions in the Act." *Id.* The Court then noted:

> While the quoted language of §§ 5, 6, and 10 is not identical in each case, we believe that these provisions, together with § 2, First, form an integrated, harmonious scheme for preserving the status quo from the beginning of the major dispute through the final 30-day "cooling off" period. Although these three provisions are applicable to different stages of the Act's procedures, *the intent and effect of each is identical so far as defining and preserving the status quo is concerned.* The obligation of both parties during a period in which any of these status quo provisions is properly invoked is to preserve and maintain unchanged *those actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose and which are involved in or related to that dispute.*

Id. at 152-53 (footnotes omitted; emphasis added). Thus, the three status quo provisions of the Act are intended to operate as a continuum.

Once a strike occurs after exhaustion of the procedures prescribed by section 6, the obligations upon the carrier are modified to permit the struck carrier to initiate changes in work rules or conditions of employment which are "reasonably necessary" "in order to make a meaningful reality of [the carrier's] right to continue to operate [during the strike]." *Florida E.C. Ry. Co. v. Brotherhood of Railroad Trainmen*, 336 F.2d 172, 182 (5th Cir. 1964). The reasonable and necessary criteria are to be strictly construed, for as the Supreme Court stated:

> The collective bargaining agreement remains the norm; the burden is on the carrier to show the need for any alteration of it, as respects the new and different class of employees that it is required to employ in order to maintain that continuity of operation that the law requires of it.

Id., 384 U.S. at 248.

B. *Section 10 Status Quo Requirement*

1. *The Scope of the Emergency Order*

Here, the strike was ended by the President's creation of the Emergency Board on May 16, 1986. Under section 10 of the RLA, 45 U.S.C. § 160, the parties were thereby required to restore the status quo, since, for a sixty-day period thereafter, "no change, except by agreement, shall be made by the parties in the *conditions out of which the dispute arose.*" 45 U.S.C. § 160 (Emphasis added.) One of the Plaintiff's principal contentions is that the effect of the Executive Order is to impose the section 10 status quo obligation upon B&M and D&H as well as upon MEC/PT. The contention is that B&M and D&H have become "parties to the controversy" in the language of section 10 by the doctrine of "substantial alignment" as that has been developed in the jurisprudence determining the legitimacy of secondary strikes and picketing. *Brotherhood of Railroad Trainmen v. Atlantic Coastline R.R. Co.*, 362 F.2d 649 (5th Cir.) *aff'd by an equally divided court*, 385 U.S. 20 (1966); *Southern Railway Co. v. Brotherhood of Railway, Airline and Steamship Clerks*, 458 F. Supp. 1189 (D.S.C. 1978).

The Court addressed this contention preliminarily in its June 18, 1986, Bench Ruling on the Defendants' *in limine* motion to exclude evidence of "substantial alignment." The Court there held that the policy goals and interests of the parties underlying the "substantial alignment" doctrine did not necessarily address adequately

the salient policy goals and party interests at stake in determining the scope of the section 10 status quo obligation once it arose. The Court, therefore, rejected "substantial alignment" as the operative test[4] to determine whether parties other than those named in the Executive Order become subject to the status quo obligations imposed by section 10. The Court now reaffirms that ruling.

Section 10, by its very design, vests authority in the President to invoke its procedures. As the Court has previously pointed out, the President's Executive Order specifically identifies the MEC/PT and certain of their employees as participants in the dispute to be investigated by the Emergency Board. The plain meaning of this designation is that only those parties, and not the D&H and B&M, are subject to the Emergency Order. This Court can not enlarge upon, by any process of construction, a decision entrusted to and already executed by the President.

This reading of the Emergency Order is also consistent with the operation of the Act. Significantly, section 6 of the Act creates its own status quo requirement. This remains in force long as the section 6 procedures for negotiated settlement of disputes are being carried out. It can be deduced from the structure of the Act that the section 10 status quo is intended to be imposed upon a carrier and its employees *only after* the section 6 procedures have been exhausted and after the status quo related to them has ended. Section 10 provides spe-

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[4] At trial the Court indicated what might be the content of an appropriate standard to utilize in order to determine in a specific case whether parties not named in the Order could be found to be bound by the section 10 status quo obligation. *See* IT-69. In view of the reasons which the Court here finds on the specific facts of this case to dictate the conclusion that B&M and D&H are not under the status quo obligation created by Emergency Order No. 2559, there is neither occasion nor need for the Court to here pursue the question of the appropriate content of such a standard.

cifically that an Emergency Board may be appointed to settle a dispute between a carrier and its employees *only* after other procedures of the RLA have been exhausted. 45 U.S.C. § 160. Here, the only parties who have exhausted the section 6 procedures are those named in the President's order. Indeed, MEC/PT is the only carrier here being struck; D&H and B&M are only the subject of secondary picketing by BMWE employees of MEC/PT. Thus, the wording of the President's order, the structure of the statutory provisions that make up the RLA, the plain meaning of both, and the content of the doctrine of separation of powers clearly indicate that the only carriers in this case properly subject to the section 10 status quo requirement are MEC/PT.

Since section 10 does not apply to them, the actions of B&M and D&H and their contract employees will be assessed in light of their traditional obligations under the RLA. Specifically, the B&M and D&H were obliged to abide by (1) the section 2, First, obligation; (2) the specific terms and provisions of existing collective bargaining agreements; and (3) the content of mutually established practices in respect to rates of pay, work rules, and working conditions. These obligations were modified pursuant to the *Florida East Coast* provisions during the period of the strike when B&M and D&H were picketed.[5] The effect of the Emergency Order on

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[5] It does not escape the Court's notice that the *Florida East Coast* case involved as a point of fact the definition of a carrier's collective bargaining obligation where *a strike* was in effect *against the subject carrier*. So far as B&M and D&H are concerned, that is not the case; they were only the object of secondary picketing by the BMWE employees of MEC/PT. Nevertheless, the Court sees no reason why the teaching of *Florida East Coast* should not apply with equal force to a carrier which is faced with a temporary operational emergency because its employees will not cross picket lines of employees of another carrier. At least on the facts of this case, the effect of such conduct was as debilitating to the carrier's ability to operate and provide its public service as was the strike

the D&H and B&M was to end the secondary picketing on those carriers and thereby end the reasonable and necessary modifications permissible pursuant to *Florida East Coast*. Thus, the tripartite obligations are revivified with the same force and effect that they possessed before the commencement of the strike.

2. *Effect of Section 10 Status Quo on MEC/PT*

A. *The Effect of the Emergency Order*

With respect to MEC/PT, there is no question but that the creation of the Emergency Board imposed an obligation on both the carrier and the union to return to the status quo. The parties disagree, however, over the exact effect of that section 10 status quo requirement. The Plaintiff contends that the status quo requirement prohibits MEC/PT from making the job abolishments it made after striking workers returned to work pursuant to the Emergency Order. MEC/PT maintains that the job abolishments were not prohibited by the terms of the pre-existing agreement or past practice when based upon economic conditions and that, therefore, the job abolishments at issue did not violate the status quo provision.

Section 10 fixes the status quo "in the conditions out of which the dispute arose." 45 U.S.C. § 160. The dispute which precipitated the strike of March 3, 1986 was first formalized in the union's section 6 notice, which was served on April 2, 1984. The dispute, as so formalized, was over the BMWE's desire to negotiate under section 6 concerning new job protection terms in the collective bargaining agreement.[6] Accordingly, the Court

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itself upon MEC/PT's operational capacity. Application of the *Florida East Coast* doctrine in such circumstances serves the same salutary purpose as where the emergency is precipitated by a strike of the carrier's own employees.

[6] Strictly speaking, the "dispute" arose earlier, that is, in the negotiations that preceded the service of the union's section 6

finds that the dispute arose on April 2, 1984, and that the status quo to which the parties are required by the Emergency Order to return is that manifested by the "actual, objective working conditions and practices, broadly conceived, which were in effect," *Detroit and Toledo*, 396 U.S. at 153, immediately prior to the service of the section 6 notice on April 2, 1984.[7] These encompass the rates of pay, work rules and conditions of employment provided for by the existing collective bargaining agreement and/or previously established practices, *id.* at 153-54, in effect before the "dispute" arose.

The practical effect of the Emergency Order, then, was to end the strike and to require MEC/PT to permit the return of its employees to work under the conditions described above. The Emergency Order deprived the carrier, MEC/PT, of the authority under the *Florida East Coast* case to make reasonable and necessary changes, strictly construed, in work rules and conditions of employment.

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notice. The evidence does not shed any light, however, on the specific course of those negotiations. Thus, the earliest date on which the Court can, on the evidence, determine that the dispute arose was April 2, 1984, the date of service of the notice. There is no evidence that either the terms of the collective bargaining agreement or the "actual, objective working conditions and practices broadly conceived," *Detroit and Toledo*, 396 U.S. at 153, underwent any change in the period between April 2, 1984, and the prior date on which the job protection issued was first raised in the course of the negotiations preceding service of the section 6 notice.

[7] As noted earlier, the status quo provisions of the RLA are intended to operate in a continuum. *Supra*, at 18-19. This case presents an anomalous situation in that the President did not appoint an Emergency Board pursuant to section 10 and thereby invoke the section 10 status quo provision until after the section 6 status quo period had expired and the parties had resorted to self-help. However, in light of the intended operation of the status quo provisions of the RLA, it is clear that even in this situation the section 10 status quo requirement operates to extend the prior status quo.

B. *The Post-May 19, 1986 Job Abolishments*

MEC/PT contends, and the RLEA does not disagree, that prior to April 2, 1984, and during the section 10 status quo period, it was entitled to abolish jobs based upon economic considerations. At trial, MEC/PT presented credible evidence that traffic, carloadings, and gross revenues on the MEC/PT were all significantly reduced in the months following the strike,[8] and the Court so finds. *See, e.g.*, Defs.' Exs. 13a, b and c, 12a and b, 29a-g; Tr., Vol. 2, at 497-517; Tr., Vol. 3, at 55. As of the time of trial in June 1986, traffic on the carriers had increased *vis-a-vis* the previous three-month period, but had not returned to pre-strike levels. Tr., Vol. 3, at 41-42. The Court concludes that after the return to work on May 19, MEC/PT, consistent with its section 10 status quo obligations, would have been justified in implementing an appropriately conceived and executed reduction in its work force based upon the actual economic conditions of the carriers' business after that date.

The finding that MEC/PT was entitled to reduce its work force through job abolishments pursuant to the contract and prior practice, however, is not the end of the Court's inquiry. MEC/PT, as part of its section 10 status quo obligation, was required in accomplishing job abolishments to "extend every reasonable effort to maintain agreements," that is, to act in a manner consistent with its collective bargaining agreements and past established practice. The carrier apparently acknowledges that such job abolishments must be based upon economic exigency, *i.e.*, needs arising from business conditions of the carrier. The carrier does not claim the right to achieve the subject job abolishments on any basis other

[8] Defendants' Exhibits 13a, b, and c graphically demonstrate these decreases and are, therefore, appended to this opinion as Appendices "A," "B," and "C," respectively.

than that the collective bargaining agreements and past practice permit reduction in the work force where reduced levels of carloadings and gross operating revenues create a need for them.[9]

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[9] The Court is in a curious position with respect to its ability to determine the specific terms of the collective bargaining agreements. The parties have not put in evidence significant portions of the collective bargaining agreements. Even those copies of the agreements marked for identification appeared to be, in most cases, only partial copies of the complete agreements. No version of a National Agreement has been put in evidence. Yet, nearly all of the witnesses have testified as to the contents of the various collective bargaining agreements in one respect or another.

The Court is fully satisfied, despite the paucity of evidence of actual contract language, that there is no disagreement over the proposition that MEC/PT collective bargaining agreements and past practices permit the carriers to make reductions in work force through job abolishments so long as a decline in business sustained by the carrier necessitates work force regulations. The President, Chief Executive Officer and Chairman of MEC/PT, David A. Fink, testified that he decided that all MEC/PT employees would be returned to the positions which they held before the occurrence of the strike. He then testified: "And I said, we will then reduce our employment *in line with our business in accordance with our contracts.*" Tr., Vol. 3, at 133-34 (emphasis added). The Defendants concede in their post-trial briefs that the carrier's entitlement to make the reductions in the work force which occurred on MEC/PT after May 19 was in fact based upon the economic circumstances of the carrier's operation after that date. It is stated in the Defendants' brief on behalf of MEC/PT:

> The Company thereupon, pursuant to its collective bargaining agreements, issued permanent job abolishment notices, with appropriate advance notice, terminating such positions *as were not needed due to the Company's 44 percent decline in business* as compared to the period before the strike.

Id. at 3 (emphasis added). Further, Defendants also state in the brief:

> The evidence is overwhelming that the MEC's May 19 job abolishments were motivated *by business judgment reflecting a dramatic downturn in business*, and had no basis in the punishment of striking workers.

Id. at 15 (emphasis added).

On this basis, MEC/PT could not abolish jobs in a way calculated to punish striking workers returning pursuant to the Emergency Order. Nor could it, having determined that economic necessity justified abolishing a certain number of jobs, single out for abolishment only those jobs held by those employees who (1) were of the contract labor force or (2) being contract laborers, had exercised their organizational rights against the carrier. Rather, the carrier was required to focus only on assessing the need for continuance of a specific position, or positions, in light of the existing economic conditions. Resolution of the question of which members of the contract labor force were to fill the remaining positions and which were to be furloughed should have been left to the operation of the seniority provisions of the collective bargaining agreement.[10]

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[10] Plaintiff has vigorously contended herein that the carrier could not make any job abolishments after the commencement of the status quo period without first coming to the Court and obtaining the Court's approval of such abolishments. Plaintiff bases this contention upon certain langauge contained in the *Florida East Coast Railway* case. The Court, in stating the facts of that case, observed that the District Court entered an injunction against the carrier requiring it to abide by the terms of existing collective bargaining agreements "except upon specific authorization of this Court after a finding of reasonable necessity therefor upon application of the [carrier] to this Court." *Id.* at 242. Mr. Justice White, in his dissenting opinion, refers to this fact in the following terms: "But with the consent of the United States Court, or a state court for that matter, the carrier may now make any change essential to its continued operation." *Id.* at 249 (omitting footnote).

From these references, the Plaintiff concludes that the case stands for the proposition that once a section 10 status quo period is commenced, the carrier cannot make any reductions in work force pursuant to the collective bargaining agreement, or otherwise, without first obtaining specific approval of the reductions by a District Court. Clearly, the case does not so hold. Reference to the underlying District Court opinion in case, *Florida East Coast Railway Company v. Brotherhood of Railroad Trainmen*, 336 F.2d 172 (5th Cir. 1964), reflects that the District Court adjudicated, on the

The methodology utilized by MEC/PT to determine job abolishments after the May 19 return to work is violative of these requirements. The principal defect of the methodology chosen is that it uses as the focus for determining which jobs are to be abolished not the contribution to economic efficiency made by the position in the current economic conditions, but, rather, the identity of the position's incumbent. The carrier clearly selected jobs to be abolished so as to avoid retaining those employees who had not worked during the strike. This practice had the effect of telescoping the two stages of the process as properly conducted (*i.e.*, selection of job to be abolished by economic and job function criteria followed by selection of worker to be furloughed by seniority criteria) into one predetermined, and in this case, self-serving, step by the carrier.

As a practical matter, this process wrote out of the labor-management relationship, in relation to these post-May 19 job abolishments, the employees' seniority rights as conferred by the collective bargaining agreements and prior practice. The workers whose jobs had been abolished could not return except to a bulletined position, where the carrier had the right to make the award on the basis of seniority. However, virtually all of the workers had improperly lost their seniority rights, after

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facts of the case, the carrier to be in violation of the section 6 status quo requirement. *Id.* at 180. The Court imposed the requirement of prior approval for subsequent reductions in force as an element of the remedy which the Court provided as a consequence of the adjudication of violation of the section 6 status quo.

Here, however, there is not, as of the time of trial, any adjudication that this carrier has violated any provision of the RLA. Indeed, the very question to be resolved in this litigation is whether such a violation has occurred. It is this Court's view that a carrier is not under any obligation to seek Court approval of reductions in force during a status quo period, or otherwise, where it has not been adjudicated to be in violation of the RLA and that requirement imposed as a remedial consequence thereof by an Order of Court.

having been put to the Hobson's choice of not honoring the picket lines or forfeiting seniority. *See, supra,* at 3, n. 1. Workers displaced by job abolishments had no opportunity to "displace," on the basis of their seniority, workers who had not honored the strike. The inescapable effect was that "super seniority" was conferred upon the nonstriking worker whose job was not abolished. This changed the work rules and conditions of employment in respect to the seniority system implemented by the collective bargaining agreement.

Clearly, the carrier is required under section 2, First, to honor seniority rights under the agreements and to afford an opportunity for the seniority proceeds to vindicate them. Failure to do so departs from the collective bargaining agreement as it existed prior to the "dispute" arising. The collective bargaining agreement is an "actual, objective working condition" in effect prior to the time the present "dispute" arose. Hence, the departure from the agreement is also a violation of the section 10 status quo obligation imposed as of May 16, 1986.

The carrier's method suffers from a second defect. The job abolishment program, post-May 19, is based upon the assertion that the reduction in the carrier's business levels that was occasioned by the strike requires, after May 19, fewer workers than were required before April 3, when the strike began, in order to do the available work. That may in fact be the case. The Court has found that the strike did cause a significant decline in the carrier's carloadings and gross revenues. *See, supra,* at 25-26. The carrier has consistently taken the position, however, that economic necessity requires that the percentage of decline in dollar-gross revenues be translated directly into *an identical percentage decline in number of contract labor positions.* Thus, the carrier contends that, for example, a 44 percent decline in gross revenue au-

thorizes the carrier to effect a 44 percent reduction in the number of contract jobs.

There is, however, no evidence whatever to suggest, even remotely, the validity of that correlation. The correlation is, for all that is shown in this record, a purely arbitrary assumption. If the carrier is to justify the post-May 19 job abolishments on the basis that economic conditions precipitated by the strike necessitate fewer positions, it must do so by some discrete, analytical process supported by evidence relating to the impact of revenue reduction and job function upon operating efficiency. This the carrier has not done.

There is no reason to suppose, and a great deal of reason not to believe, that a percentage decline in gross revenues or in carloadings translates directly, as a matter of economic impact, into a need for an identical percentage reduction in the number of contract labor jobs. Economies of scale in the various operating sectors of the carrier are thereby ignored and were apparently never explored. There is no indication that any effort was made, or consideration given, to spreading the impact of work force reductions between management and contract labor. One cannot help but reflect on the possibility that abolishment of large numbers of labor positions, as occurred here, must eventually give rise to some reduction in the need for supervisory personnel. It is not explained why the carriers chose to put the full burden of work force reductions in an emergency situation upon the contract labor force. The failure to even consider these and other alternative factors resulted, in the Court's view, from the carrier's predetermined, and improper, design to reduce the work force *by eliminating strikers as employees.*

The post-May 19 job abolishments on the MEC/PT clearly violated the carrier's obligation not to make changes in work rules or working conditions except in conformity to section 6 and section 2, Seventh, of the

RLA. As such, they constitute violations of the section 10 status quo obligation imposed upon the carrier by the creation of the Emergency Board.[11] On the foregoing basis Plaintiffs are clearly entitled to the benefit of appropriate equitable relief to redress these violations.[12]

IV. *The B&M and D&H Return to Work*

In considering the effect of the issuance of the Emergency Order on the B&M and D&H, the carriers' officers deduced, Tr., Vol. 3, at 141, correctly as it turns out, that the Order imposed no obligation upon those carriers under section 10 of the RLA to return to work those employees who had honored the picket lines of MEC/PT's BMWE employees. They then concluded, incorrectly as it turns out, that the carriers were under no obligation to return those employees to work on May 16. On that basis, the unions' offers on behalf of those employees to return to work after May 16, 1986 were rejected. The carriers took the position that none of these employees could return to work until the carriers had assessed their work force needs in light of the current business condi-

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[11] In addition, these job abolishments are also a violation of the carrier's section 2, First, obligation to exert every reasonable effort to maintain its agreements. By selectively abolishing positions occupied by strikers and failing to properly determine the scale of abolishments required in order to effectively meet the economic emergency, the carrier improperly infringed upon the contract rights of the union labor face. The job abolishment program, as executed on the MEC/PT, became a cynical effort to undermine and destroy the collective bargaining agreements then in effect.

[12] Plaintiff makes a multitude of other claims of violations by MEC/PT of rights of workers under either the RLA or contract/practice provisions of the collective bargaining agreement which are based upon specific factual situations. In view of the resolution reached herein with respect to the post-May 19 job abolishments, the Court need not reach issues so generated. Since the section 10 status quo period expires on July 21, 1986, the need for an expeditious decision militates against lengthy consideration of such issues.

tions on the carriers and had bulletined new positions for appointment on the basis of that assessment. Thus, the carriers said, the work force employees who had honored the BMWE picket lines could return only by bidding on the bulletined positions and on being awarded a position pursuant to the pertinent collective bargaining agreements.

The predicate for the carriers' conclusion that they were under no obligation to return the subject employees to work was that the employees were without positions as of May 16 because of the permanent job abolishments accomplished on April 18. But for these abolishments the carriers would have been required to return the employees to work as of May 16 in the positions that they had held before commencement of the secondary picketing on those carriers. This is so because the issuance of the Order ended the strike of MEC/PT's BMWE employees against that carrier. With the end of the strike those employees ended their secondary picket against the B&M and D&H. With the end of the secondary picketing, the emergency ended on those carriers. Pursuant to the collective bargaining contracts and the provisions of the RLA, the employees who had been honoring the picket lines were entitled to return to work and the carriers were obliged to facilitate their doing so. The section 2, First, obligation to "exert every reasonable effort to . . . maintain agreements" reinforced this obligation, as did the requirements of section 2, Seventh, which prohibited changes in rules and working conditions except through the collective bargaining processes mandated by Section 6.

The carriers recognized that such would be their obligation. The carriers' President and Chief Executive Officer, Mr. Fink, testified that he approved the decision to implement the April 18 job abolishments. Tr., Vol. 3, at 86-181. The "primary consideration" for the approval of those permanent abolishments was to avoid having to take back the employees on those carriers who were hon-

oring the picket lines if the strike was ended by a Emergency Order. *Id.* at 181-82. This is a clear admission that the carriers recognized their obligation to take back the subject employees on issuance of the Emergency Order. Failure to do so would clearly be a breach of the carriers' section 2, First, obligation to exert every reasonable effort to maintain contracts. The Court is fully satisfied that Mr. Fink and the carriers' other labor management executives were well aware of that fact.

Mr. Fink's testimony also established beyond cavil that the primary reason for the April 18 job abolishments was to avoid that obligation. No other reason was given for making, at that time, those *permanent* abolishments. The workers were then honoring the BMWE picket lines, and the carriers had already temporarily abolished the positions of all employees who were doing so for the period of the economic emergency created by the secondary picketing. Indeed, there is no basis on which the carriers can justify making, at that particular point in time, *permanent* job abolishments unless the carriers' officials could accurately foresee the future.

Thus, the making of *permanent* job abolishments for the primary reason of avoiding the return of the subject employees when the strike ended was nothing less than a deliberately calculated, anticipatory breach of those obligations which the carriers recognized they would incur under the agreements and the RLA provisions upon the ending of the strike. That entire course of conduct was intended to put the carriers in a position to dishonor those obligations in the future.

The Court is satisfied that the management personnel of these carriers well knew the proper process to follow if business conditions after May 16 justified furloughing some of these employees. They knew they were required to honor the obligation to return the employees to work under the agreements on the ending of the strike and then begin a proper process of work force reductions by

job abolishments based on considerations of economic conditions and job function which would permit the exercise of seniority rights to determine which employees were to be furloughed because of the abolishments. The unjustified job abolishments on April 18 (which are unjustifiable by any proper standard)[13] were a cynical attempt to undermine the employees' contract rights at the end of the strike for the avowed purpose of "avoid[ing] an influx of people if the strike ended." *Id.* at 182. Yet, the right of the employees to such a return to work was properly secured to them by the RLA provisions as well as by the terms of the collective bargaining agreement.

Thereby, the carriers sought to avoid the employees' rights and the need to return the employees to work until a proper process of job abolishment could be implemented. Also, the operation of the seniority system to permit those of the employees who had seniority over the workers who remained on the job during the secondary picketing to

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[13] The carriers do not seek to justify these job abolishments under the reasonable and necessary modifications rule of *Florida East Coast Railway, supra,* of which the carriers had the benefit on April 18. *See, supra,* at 22, n. 5. Indeed, in oral argument they expressly disavow any resort to that standard, relying entirely upon the contract terms to justify those abolishments. Even applying the *Florida East Coast* standard, however, the abolishments cannot be justified. At the time they were made on April 18th, there was no necessity for them; and it is clear that under *Florida East Coast* changes are reasonable only if they deal with *immediate* exigencies caused by the strike. It is unreasonable to make changes on the basis of an unsupported anticipation that if and when an Emergency Board was created, the business conditions of the carriers would justify furloughing *all* employees who honored the picket lines, even for as brief a period as a week or ten days. Moreover, as of May 16, 1986, the carriers had an appropriate procedure available to them consistent with their contract obligations to assess their contract labor requirements and accomplish proper adjustments in employment levels on the basis of the actual conditions as they then existed. The permanent abolishments, then, were neither reasonable nor necessary under the *Florida East Coast* case.

displace the latter employees was rendered totally ineffective. In effect, "super seniority" was thereby illegally conferred on those employees who had remained at work.

The parties have vigorously disputed the propriety of the carriers' conduct in insisting upon the employees' compliance with work rules requiring the filing of names and addresses by furloughed workers and timely exercise of displacement rights. The carriers have contended that failure to comply with such rules was an adequate justication for their refusal to take back the employees who honored the picket lines. The Plaintiffs have countered that the rules were discriminatorily enforced on the occasions in question, had not in every instance been enforced in the past, and that the manner of enforcement violated past enforcement practice. Most importantly, the Plaintiff argues, the enforcement of the rule requiring timely exercise of displacement rights, during the period that the strike and related secondary picketing against the carriers was going on, deprived the employees of their organizational rights, that is, the right to honor BMWE's picket lines.

This whole congeries of disputes becomes academic, however, upon the Court's determination that the permanent job abolishments of April 18 were illegal. Without those permanent job abolishments there was no occasion for the employees to exercise any displacement rights. In the absence of the abolishments the employees were not permanently displaced and had no displacement rights. Those abolishments, being in violation of the RLA provisions, are without legal effect and the employees affected by them are entitled to be returned to work whether or not they complied with the subject work rules.[14]

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[14] The Plaintiff once again generates a multitude of other issues challenging the conduct of B&M and D&H in the period following the commencement of secondary picketing against them. These issues are not addressed in view of the Court's decision that the

V. *Back Pay*

Plaintiffs seek back pay for those workers on all carriers whose jobs, the Court has determined, were lost because of the carriers' violation of the rights secured to them by the RLA. It has long been established that a district court has authority to require payment of back pay as a sanction for a carrier's having violated section 6 of the RLA. *United Industrial Workers of the Seafarers International Union v. Board of Trustees of Galveston Wharves*, 400 F.2d 320 (5th Cir. 1968). The Court in *Galveston Wharves* explained:

> [T]he purpose of the relevant sections of the Act is maintenance of the status quo pending conference. The employees wrongfully laid off cannot be retroactively reinstated, but they can be retroactively compensated. This does not punish the carrier. Nor does it constitute a windfall to the employees. It is the price of reconstructing the status quo; it compensates the employees for the losses incurred by their being laid off in violation of the Act.

Id. at 325. Such an award makes the workers whole and prevents the carrier receiving a windfall as a result of its violation of the Act. *Id.* at 326.

The rationale for awarding back pay for violation of the section 6 status quo provisions applies with equal force to situations, like this one, in which the Court has found a violation of the section 10 status quo obligation. That obligation is the end of the continuum of status quo provisions set forth in the Act and has, as discussed above, the same purpose and effect as the others. *Detroit and Toledo*, *supra*, at 152-53. The Court finds, therefore, on the facts of this case that an award of back pay is appropriate as against the MEC/PT for their violation of section 10.

April 18 permanent job abolishments were invalid and the effect of that conclusion, for the reason previously expressed, *supra*, at 33 n. 12.

The imposition of back pay here is also necessary to vindicate the employees' rights to return to work on the D&H and B&M. Such an award will serve as an incentive to the carriers to take seriously their obligations under section 2, First, of the Act. *See Chicago & Northwest Railway Co. v. United Transportation Union,* 402 U.S. at 577. Vindication of the workers' rights and deterrence of the conduct of the carriers are both particularly necessary here since the section 10 status quo will end in ten days, on July 21, 1986. Thereafter, the parties will once again be entitled to the exercise of self-help. The bulk of the period during which the employees were entitled to be returned to work has now passed. Hence, the prospective benefit of this decision may be of short duration to the employees. Because of this circumstance, a back pay award is appropriate in order to avoid accrual of a windfall benefit to the carriers because of their illegal conduct and to secure to the employees meaningful relief for the violation of their collective bargaining rights since May 16, 1986.

ORDER

For the foregoing reasons the Plaintiff's claim for permanent injunctive relief as of May 16, 1986, is hereby *GRANTED.* It is hereby *ORDERED* that a Permanent Injunction against the Defendant carriers in the form and substance reflected by Appendix "D" hereto annexed be entered forthwith.

/s/ Gene Carter
GENE CARTER
United States District Judge

Dated at Portland, this 11th day of July, 1986.

APPENDIX "A"
DEFENDANT'S EXHIBIT 13-A

BOSTON & MAINE CORPORATION
DELAWARE & HUDSON RAILWAY COMPANY
MAINE CENTRAL RAILROAD COMPANY

MARKETING AND SALES DEPARTMENT

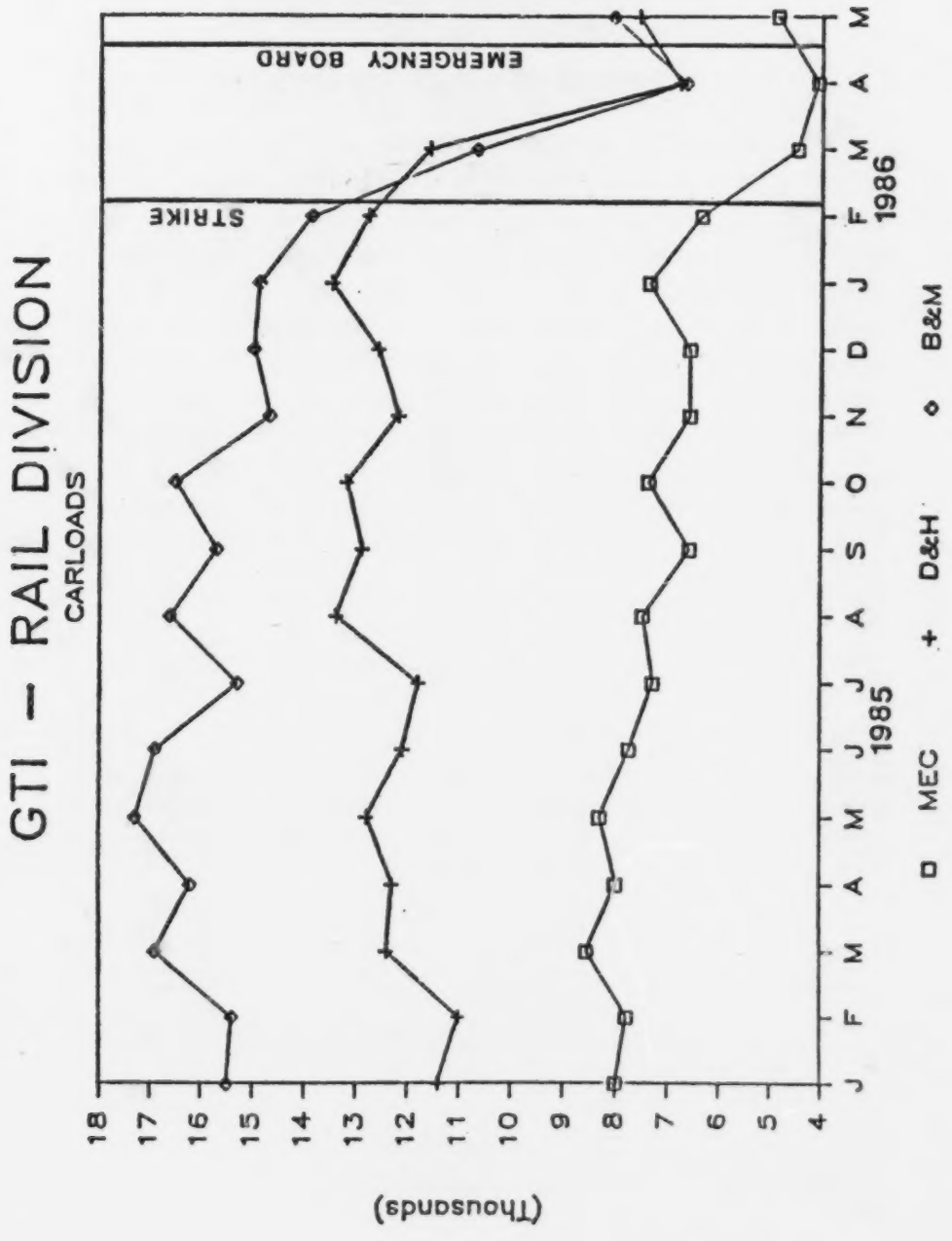
CARLOADINGS
JANUARY 1985 - APRIL 1986

MEC		BM		DH	
MO.	C/L's	MO.	C/L's	MO.	C/L's
1985		1985		1985	
Jan.	8,003	Jan.	15,555	Jan.	11,355
Feb.	7,805	Feb.	15,417	Feb.	11,049
Mar.	8,550	Mar.	16,932	Mar.	12,400
Apr.	8,066	Apr.	16,179	Apr.	12,301
May	8,301	May	17,284	May	12,758
June	7,751	June	16,908	June	12,094
July	7,259	July	15,336	July	11,812
Aug.	7,509	Aug.	16,625	Aug.	13,386
Sept.	6,635	Sept.	15,705	Sept.	12,930
Oct.	7,406	Oct.	16,502	Oct.	13,196
Nov.	6,629	Nov.	14,663	Nov.	12,267
Dec.	6,621	Dec.	15,029	Dec.	12,580
1986		1986		1986	
Jan.	7,407	Jan.	14,892	Jan.	13,466
Feb.	6,368	Feb.	13,905	Feb.	12,766
Mar.	4,516	Feb.	10,690	Mar.	11,631
Apr.	4,144	Apr.	6,694	Apr.	6,794

6/5/86
EVT

APPENDIX "B"

DEFENDANT'S EXHIBIT 13-B



APPENDIX "C"

DEFENDANT'S EXHIBIT 13-C

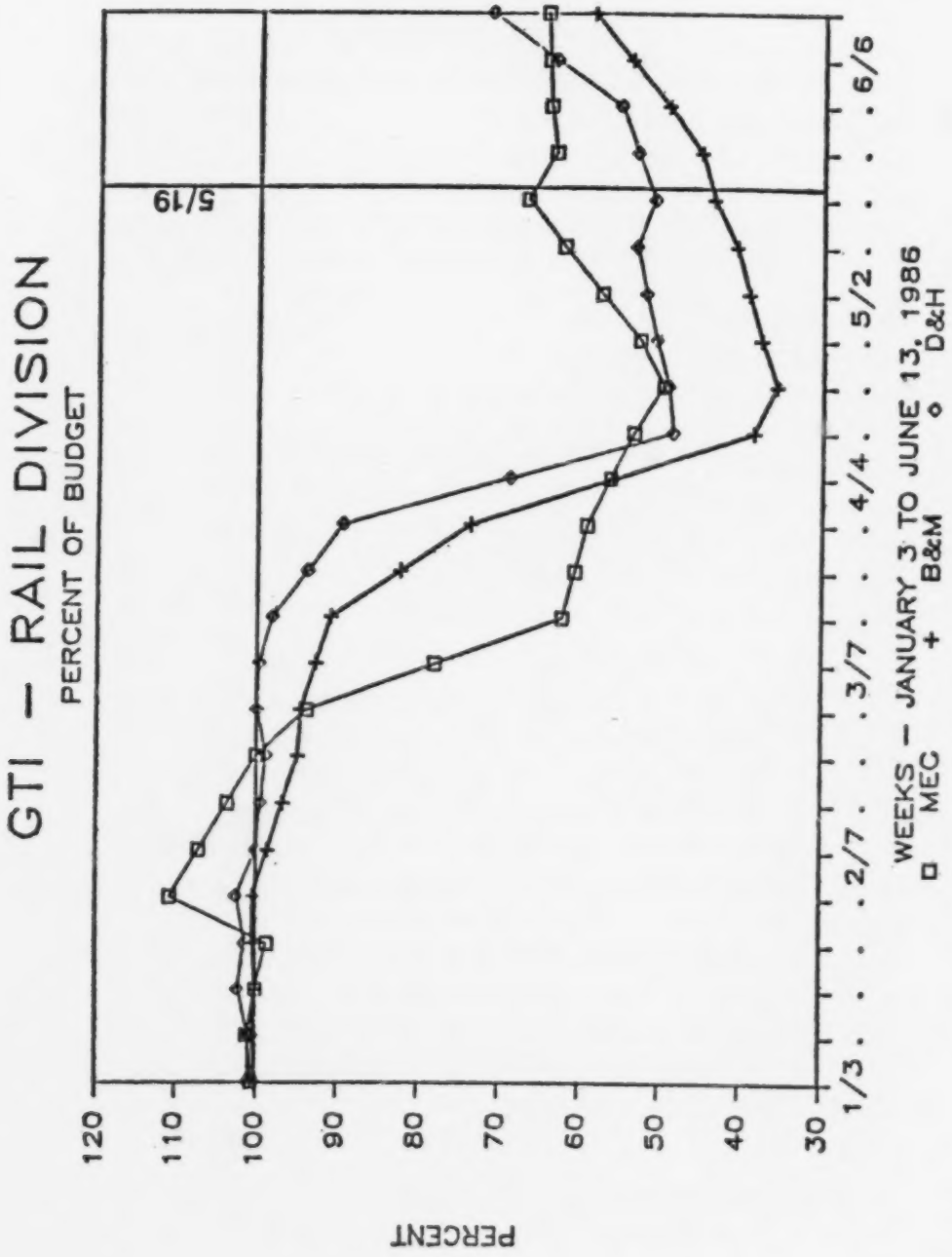


EXHIBIT "D"

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Civil No. 86-0122-P

RAILWAY LABOR EXECUTIVES ASSOCIATION,
Plaintiff

v.

BOSTON & MAINE CORPORATION,
DELAWARE & HUDSON RAILWAY COMPANY,
MAINE CENTRAL RAILROAD COMPANY, and
PORTLAND TERMINAL COMPANY,
Defendants

Civil No. 86-0194-P

THE BOSTON & MAINE CORPORATION,
DELAWARE & HUDSON RAILWAY CO.,
MAINE CENTRAL RAILROAD COMPANY, and
PORTLAND TERMINAL COMPANY,
Plaintiffs

v.

UNITED TRANSPORTATION UNION,
SHEETMETAL WORKERS INTERNATIONAL ASSOCIATION,
BROTHERHOOD OF RAILROAD SIGNALMEN,
BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
BROTHERHOOD OF RAILWAY CARMEN,
INTERNATIONAL BROTHERHOOD OF BOILERMAKERS,
IRON SHIP BUILDERS, BLACKSMITHS, FORGEMEN
& HELPERS,
BROTHERHOOD OF RAILWAY, AIRLINE &
STEAMSHIP CLERKS,
INTERNATIONAL BROTHERHOOD OF FIREMEN & OILERS,
INTERNATIONAL ASSOCIATION OF MACHINISTS, and
INTERNATIONAL ASSOCIATION OF ELECTRICAL WORKERS,
Defendants

(Transferred from U.S. District Court, District of Massachusetts, and Consolidated)

PERMANENT INJUNCTION

CARTER, District Judge

1. Plaintiff's claim in Civil No. 86-0122-P for a permanent injunction having come on for hearing and argument on June 18-24, 1986; and the evidence and post-trial briefs of the parties having now been considered by the Court; and the Court having this date separately made its findings of fact and conclusions of law in its Findings of Fact, Conclusions of Law, Opinion and Order filed on this date, it is hereby *ORDERED* that:

(a) The Defendant Maine Central Railroad Company, its officers, agents, servants, employees, and all others acting in concert with them, cause to be reinstated in employment forthwith, with back pay, all employees of the said carrier who held contract labor positions with said carrier on March 4, 1986, prior to the strike commenced by BMWE employees on that date and who were not returned to service after the end of said strike on May 16, 1986, and all such employees who were returned to service on or after May 19, 1986, and who were subsequent to such return to service furloughed by reason of any job abolishment implemented by said carrier after May 19, 1986;

(b) The aforesaid carrier, its officers, agents, servants, employees, and all others acting in concert with them, *CEASE AND DESIST* from implementing or imposing, after the date of this Order, any furlough of any said employee, or any abolishment of a position held by any said employee, except upon authorization by further Order of this Court; and

(c) Said carrier and its officers, agents, servants, employees, and all others acting in concert there-

with shall *CEASE AND DESIST* from any and all violation of the collective bargaining agreements between said employees and said carrier, and they shall each exert, pursuant to 45 U.S.C. § 2, First, every reasonable effort to maintain the existing agreements between said carrier and said employees.

2. It is hereby *FURTHER ORDERED* that:

(a) The Defendant Portland Terminal Company, its officers, agents, servants, employees, and all others acting in concert with them, cause to be reinstated in employment forthwith, with back pay, all employees of the said carrier who held contract labor positions with said carrier on March 3, 1986, prior to the strike commenced by BMWE employees on that date and who were not returned to service after the end of said strike on May 16, 1986, and all such employees who were returned to service on or after May 19, 1986, and who were subsequent to such return to service furloughed by reason of any job abolishment implemented by said carrier after May 19, 1986;

(b) The aforesaid carrier, its officers, agents, servants, employees, and all others acting in concert with them, *CEASE AND DESIST* from implementing or imposing, after the date of this Order, any furlough of any said employee, or any abolishment of a position held by any said employee, except upon authorization by further Order of this Court; and

(c) Said carrier and its officers, agents, servants, employees, and all others acting in concert therewith shall *CEASE AND DESIST* from any and all violation of the collective bargaining agreements between said employees and said

carrier, and they shall each exert, pursuant to 45 U.S.C. § 2, First, every reasonable effort to maintain the existing agreements between said carrier and said employees.

3. It is hereby *FURTHER ORDERED* that:

(a) The Defendant Boston & Maine Corporation, its officers, agents, servants, employees, and all others acting in concert with them, cause to be reinstated in employment forthwith, with back pay, all employees of the said carrier who held contract labor positions with said carrier prior to commencement of secondary picketing against said carrier on March 5, 1986 by BMWE employees of Maine Central Railroad Company and who were not returned to service after the end of said strike and secondary picketing on May 19, 1986; and

(b) Said carrier and its officers, agents, servants, employees, and all others acting in concert therewith shall *CEASE AND DESIST* from any and all violation of the collective bargaining agreements between said employees and said carrier, and they shall each exert, pursuant to 45 U.S.C. § 2, First, every reasonable effort to maintain the existing agreements between said carrier and said employees.

4. It is hereby *FURTHER ORDERED* that:

(a) The Defendant Delaware & Hudson Railway Company, its officers, agents, servants, employees, and all others acting in concert with them, cause to be reinstated in employment forthwith, with back pay, all employees of the said carrier who held contract labor positions with said carrier prior to commencement of secondary picketing against said carrier on March 17, 1986 by

BMWE employees of Maine Central Railroad Company and who were not returned to service after the end of said strike and secondary picketing on May 16, 1986; and

(b) Said carrier and its officers, agents, servants, employees, and all others acting in concert therewith shall *CEASE AND DESIST* from any and all violation of the collective bargaining agreements between said employees and said carrier, and they shall each exert, pursuant to 45 U.S.C. § 2, First, every reasonable effort to maintain the existing agreements between said carrier and said employees.

This Court reserves jurisdiction of the parties herein for enforcement of the provisions of this Permanent Injunction.

/s/ Gene Carter
GENE CARTER
United States District Judge

Dated at Portland, this 11th day of July, 1986.

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Civil No. 86-0122-P

RAILWAY LABOR EXECUTIVES ASSOCIATION,
Plaintiff

v.

BOSTON & MAINE CORPORATION,
DELAWARE & HUDSON RAILWAY COMPANY,
MAINE CENTRAL RAILROAD COMPANY, and
PORTLAND TERMINAL COMPANY,
Defendants

Civil No. 86-0194-P

THE BOSTON & MAINE CORPORATION,
DELAWARE & HUDSON RAILWAY CO.,
MAINE CENTRAL RAILROAD COMPANY, and
PORTLAND TERMINAL COMPANY,
plaintiffs

v.

UNITED TRANSPORTATION UNION,
SHEETMETAL WORKERS INTERNATIONAL ASSOCIATION,
BROTHERHOOD OF RAILROAD SIGNALMEN,
BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
BROTHERHOOD OF RAILWAY CARMEN,
INTERNATIONAL BROTHERHOOD OF BOILERMAKERS,
IRON SHIP BUILDERS, BLACKSMITHS, FORGEMEN
& HELPERS,
BROTHERHOOD OF RAILWAY, AIRLINE &
STEAMSHIP CLERKS,
INTERNATIONAL BROTHERHOOD OF FIREMEN & OILERS,
INTERNATIONAL ASSOCIATION OF MACHINISTS, and
INTERNATIONAL ASSOCIATION OF ELECTRICAL WORKERS,
Defendants

(Transferred from U.S. District Court, District of Massachusetts, and Consolidated)

ORDER ON APPLICATION FOR APPROVAL OF PROPOSED JOB ABOLISHMENTS

CARTER, District Judge

After hearing counsel, record waived, and on review of the written submissions of the parties on the Application For Approval of Proposed Job Abolishments, the Court hereby *APPROVES* the Defendant carriers' Application to abolish seven hundred twenty-five (725) positions for the reasons and on the following terms and conditions, to wit:

(1) That losses of bumping rights during the strike and forfeitures of seniority imposed during and after the strike shall be fully abrogated;

(2) That abolishments shall accord with the terms of the non-emergency notice provisions of the Agreements.

(3) That the identity of any contract labor employee to be furloughed as the result of an approved abolishment shall be determined by the operation of the contract terms and work rules in respect to seniority and the exercise of seniority rights;

(4) That all so-called "new hires" employed during the strike or secondary picketing, including all replacement employees who were promoted during the strike, shall be discharged forthwith except for the three (3) positions identified in ¶ 5 of the Affidavit of Sydney B. Culliford (the position occupied by Edward McDunough being excluded) and the two (2) positions identified in ¶ 6 of the Affidavit of Glenn E. Hartsoe;

(5) That such abolishments will not be the cause of any violation of the scope rules applicable to contract labor;

(6) That the approved abolishments shall be simultaneously accompanied by abolishment of ninety-three (93) management positions; and

(7) That it will be a violation of this Order if the carriers fail to make an FRA-mandated train inspection due to lack of adequate personnel.

The provisions of this Order are not an adjudication in any respect that job abolishments approved herein are in fact in compliance with applicable agreements and/or employee protective conditions or provisions.

The carriers are herewith authorized to carry out the aforesaid job abolishments in compliance with the foregoing terms and conditions.

So *ORDERED.*

/s/ Gene Carter
GENE CARTER
United States District Judge

Dated at Portland, this 21st day of July, 1986.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 86-1653

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Appellee,

v.

BOSTON & MAINE CORPORATION, *et al.*,
Appellants.

JUDGMENT

Entered: December 22, 1986

This cause came on to be heard on appeal from the United States District Court for the District of Maine, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed in part, reversed in part and remanded to the District Court for further action consistent with the opinion filed this day.

No Costs.

By the Court:

/s/ Francis P. Scigilano
Clerk.

[cc: Messrs. Moore and Clarke]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 86-1653

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Appellee,

v.

BOSTON & MAINE CORPORATION, *et al.*,
Appellants.

Before

Campbell, *Chief Judge,*
Bownes and Torruella, *Circuit Judges.*

ORDER OF COURT

Entered: March 13, 1987

After another careful review of the record and the district court opinion, the petitions of appellant and appellee for rehearing are both denied.

Maine Central Railroad Company (MEC) argues that there was no record support for the district court's conclusion that MEC retaliated against employees who honored the strike in its May 19th job abolishments. We disagree.

The union provided more than sufficient testimony that the carriers, including MEC, violated Section 2, First of the Railway Labor Act, 45 U.S.C. § 152, First, Tr. II,

259, 307, 375. Witnesses related various incidents and occurrences, post May 19, to support their opinion. For instance, the requirement of medical exams and drug testing for all returning workers when there is no such provision in the agreements or rules and it had never been utilized before. Tr. II, 28-29, 240. Furthermore, in the MEC engine house, the supervisor reported that non-striking workers were kept on the job and that four of them were promoted on May 23 to be assistant managers, whereas before the strike there was only one assistant manager. Tr. II, 153. The supervisor stated that MEC had created "make work" positions for the non-strikers. Tr. II, 159. The number of non-contract positions had increased since May 19 and the number of contract positions had decreased. Tr. II, 136, 139.

In regards to the Railway Labor Executives' Association's (RLEA) petition for rehearing, we merely state that the RLEA misinterprets the district court opinion. The district court's finding of an anticipatory breach precluded further analysis into the effects of the breach, *i.e.*, whether there was discrimination, and thus, this issue was never reached.

By the Court:

/s/ Francis P. Scigilano
Clerk

[cc: Messrs. Moore and Clarke]

RAILWAY LABOR ACT

§ 151a. General purposes

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

§ 152. General duties

First. Duty of carriers and employees to settle disputes

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. Consideration of disputes by representatives

All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respec-

tively, by the carrier or carriers and by the employees thereof interested in the dispute.

Third. Designation of representatives

Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organiza-

tion, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Fifth. Agreements to join or not to join labor organizations forbidden

No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this chapter, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

* * * *

§ 153. National Railroad Adjustment Board

First. Establishment; composition; powers and duties; divisions; hearings and awards; judicial review

There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided—

(a) That the said Adjustment Board shall consist of thirty-four members, seventeen of whom shall be selected by the carriers and seventeen by such labor organizations of the employees, national in scope, as have been or may

be organized in accordance with the provisions of sections 151a and 152 of this title.

(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees, or through an officer or officers designated for that purpose by such board, trustee or trustees, or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one voting representative on any division of the Board.

(c) Except as provided in the second paragraph of subsection (h) of this section, the national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one voting representative on any division of the Board.

(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filed by selection in the same manner as in the original selection.

(e) If either the carriers or the labor organizations of the employees fail to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after June 21, 1934, in case of any original appointment to office of a member of the Adjustment Board, or in case of a vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select

an individual associated in interest with the carriers or the group of labor organizations of employees whichever he is to represent.

* * * *

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

* * * *

(*l*) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof, and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days

from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award, the division of the board upon request of either party shall interpret the award in the light of the dispute.

* * * *

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named. In the event any division determines that an award favorable to the petitioner should not be made in any dispute referred to it, the division shall make an order to the petitioner stating such determination.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of

the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: *Provided, however*, That such order may not be set aside except for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based

its action. The court shall have jurisdiction to affirm the order of the division, or to set it aside, in whole or in part, or it may remand the proceedings to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1921 and 1254 of title 28.

(r) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

* * * *

Second. System, group, or regional boards: establishment by voluntary agreement; special adjustment boards; establishment, composition, designation of representatives by Mediation Board, neutral member, compensation, quorum, finality and enforcement of awards

Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other

party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, of if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board.

If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.

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§ 160. Emergency board

If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this chapter and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to

a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: *Provided, however*, That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.

There is authorized to be appropriated such sums as may be necessary for the expenses of such board, including the compensation and the necessary traveling expenses and expenses actually incurred for subsistence, of the members of the board. All expenditures of the board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose.